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MEMORANDUM

TO: **Fort Smith Public School District**

DATE: **November 15, 2019**

RE: **Arkansas Activities Association; History and Potential Claims Against the Organization**

Arkansas Activities Association

The Arkansas Activities Association ("AAA") is comprised of 490 member junior and senior high schools, both public and private. The AAA establishes rules and procedures for interscholastic activities, including classification of conferences. The Board of Directors governs the AAA and is comprised of 20 board members, including six officers. All of the board members are either superintendents or assistant superintendents for their respective school districts.

Each member school is represented by the superintendent, who may designate an assistant/deputy superintendent or the principal/assistant principal of the member school as the school's voting representative. During the annual Governing Body meeting, member schools vote on proposed rule changes.

Mission Statement: The mission of the AAA is to promote the value of participation in interscholastic activities in the AAA member schools and to provide services to the schools in a fair and impartial manner while assisting and supporting their efforts to develop thinking, productive, and prepared individuals as they become positive, contributing citizens modeling the democratic principles of our state and nation. (2019-2020 AAA Handbook, p. 8).

Main Purposes:

A. Promote the educational values inherent in interscholastic activities that contribute to the accepted aims of education while avoiding interference with the educational goals of the school.
B. Ensure that interscholastic activities shall remain an integral part of the educational program as they provide opportunities for youth to acquire worthwhile knowledge, skills, and attitudes.
C. Promote an understanding that participation in interscholastic activities is a privilege accorded to those who meet the adopted criteria.

D. Foster a cooperative spirit of good sportsmanship on the part of the school representatives, school patrons, and students.
E. Support opportunities for students to experience the benefits that are derived from teamwork, developing a sense of fair play and accomplishment. Promote an understanding and appreciation that rules, consistently applied, create order and discipline.
F. Provide standard and consistent interpretations of the rules of the association as adopted by the member schools or authorized by the Board of Directors.
G. Conduct championship events by the procedures adopted by the schools in a thorough and impartial manner.
H. Prevent exploitation of youth by special interest groups.
I. Develop standards of officiating and adjudicating to ensure greater statewide consistency and quality. (2019-2020 AAA Handbook, p. 8).

Relevant Excerpts from the 2019-2020 AAA Handbook :

- Assignment to Conferences: The AAA Board of Directors assigns schools geographically to conferences for each two-year cycle. (p. 28).
- Isolated Schools: An isolated school may request to move up in classification to alleviate excessive travel. If allowed to move up, adjustments must be made to maintain classification numbers. An isolated school shall be defined as any school whose conference one way travel averages 200 miles or more. (p. 28).
- Changing Classification or Conference:
  A. Any activity district, conference, etc., may petition the Board of Directors for a revision of the member schools in one or more conferences with a definite plan for such revision. The Board of Directors shall consider such a plan and if approved submit the plan to all schools of the state in the classification concerned for approval either by mail vote or a meeting called by the AAA president for this purpose.
  B. If such a plan is approved by two-thirds of the schools in the classification, the new conferencing plan all be considered adopted.
  C. The Board of Directors shall review the membership of conferences when reclassifying schools and is authorized to submit plans for revisions to improve the travel required for participation in athletic conference events for the majority of member schools being reassigned. (p. 17).
- Motion that passed during the 2018 annual Governing Body meeting: Schools would be able to travel for athletic trips longer than 300 miles one way once a season. Under the current AAA rules, a school is allowed to travel no more than 300 miles one way for a game or event. (Passed 221-0)

Past Intervention by the Arkansas General Assembly into the Arkansas Activities Association

Recent Bills that have passed and become law:

- Arkansas Act 1469 of 2013 (Ark. Code Ann. § 6-15-509): Students legally enrolled in a home school can participate in interscholastic activities inside the public school district the student resides, as long as the student reports to that school district within the first 11 days of classes. The student could also advise the school's principal in writing of a request to participate before tryout dates established by the school for its students.
- Arkansas Act 592 of 2017 (Ark. Code Ann. § 6-15-509): Home-schooled students are allowed to go outside the district the student resides and participate in interscholastic activities there, as long as there is an agreement between the school districts. However, the student must wait one calendar year to participate if it's an athletic activity.
- Arkansas Act 453 of 2017 (Ark. Code Ann. § 6-15-510): Home-school students are allowed to participate at private schools if the school is within 25 miles of the student's residence, but the same one-year wait for an athletic event still applies unless the student is approved to participate before July 1 of the year the student enters seventh grade.

Proposed Bills that were proposed, but not passed:

- Senate Bill 870 of 2015 and 2017: Proposal that would make the AAA into a state commission, including board members appointed by the governor and leaders of the Arkansas House and Senate. Similar bills were proposed in 2015 and 2017 but failed to pass.
- Interim Study Proposal 2015-009 of 2015: a request for the Arkansas Legislative Council to direct the Arkansas Senate Committee on Education to conduct a study of possible state regulation of interscholastic activities in lieu of regulation by the AAA. The proposal specifically states that "recent decisions by the AAA call into question its ability to regulate interscholastic activities in a fair and well-reasoned manner that includes thoroughly investigating alleged violations of AAA rules, consistently adhering to the provisions of its constitution and bylaws, and respecting the accomplishments and achievements of student-athletes."

Introduction to Possible Claims

The Fort Smith School District (the "District") may file suit against the AAA and assert some or all of the following claims against the AAA:

1. An equal protection claim under 42 U.S.C. § 1983;

2. A due process claim under 42 U.S.C. § 1983; and/or

3. A state law claim that the AAA has acted arbitrarily.

Jurisdiction

Federal district courts have federal question jurisdiction based on federal constitutional claims for equal protection and due process under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983. *See Wright v. Arkansas Activities Ass'n*, 501 F.2d 25, 27 (8th Cir. 1974). Federal courts exercise supplemental jurisdiction over related state claims, such as a state law arbitrariness claim discussed below. *See Wooten v. Pleasant Hope R-VI School Dist.*, 139 F. Supp. 2d 835, 843 (W.D. Mo. 2000).

Arkansas state courts also would have jurisdiction over a lawsuit brought against the AAA. State courts may assume jurisdiction over lawsuits based on federal law "absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). In *Arkansas Activities Association v. Meyer*, the Arkansas Supreme Court specifically addressed whether it had jurisdiction over a lawsuit brought against the AAA. 304 Ark. 718, 722 (Ark. 1991). The court stated that could review the actions of a voluntary associations, such as the AAA, so long as the voluntary associations' decisions were based on "mistake, fraud, illegality, collusion, or arbitrariness." *Id.* (quoting *Bruce v. South Carolina High School League,* 189 S.E.2d 817, 819 (S.C. 1972)). Given the allegations against AAA of constitutional violations, including violation of equal protection under the laws, denial of due process, and arbitrariness and capriciousness, the Arkansas court accepted jurisdiction in *Meyer*. *Id.*

At least one Arkansas plaintiff has sued the AAA's Executive Director. *Hansen v. Arkansas Activities Ass'n*, Case No. CV 2012-4107, Pulaski County Circuit Court, Ninth Division (Apr. 22, 2013) (plaintiff sued both the AAA and Lance W. Taylor, the current Executive

Director), suggesting that claims could be cognizable against AAA's Board of Directors in addition to the entity, itself.

AAA as a State Actor

A threshold question for constitutional claims brought pursuant to § 1983 is whether the alleged constitutional deprivation involves state action. *Meyer*, 304 Ark. at 722. The Eighth Circuit Court of Appeals has answered this question affirmatively, ruling that "the [AAA] does qualify as a 'person' under § 1983 and jurisdiction is vested under § 1343(3) . . . ." *Wright*, 501 F.2d at 28. The *Wright* court quoted with approval the district court's decision regarding AAA's status as a state actor:

> While the Association is not a State agency that is immune from suit, it appears to be established, nevertheless, that the actions of athletic associations like the one before the Court in regulating public school athletic activities and imposing sanctions for rule violations are State actions and fall within section 1983 where they violate federally protected rights.

Id., at 28 n.2.

The Arkansas Supreme Court also has addressed the issue of whether the AAA is a state actor. In *Meyer*, the Court found that, even though the AAA "is not a state agency, the [AAA] has significant contacts and relationships with the public schools of this state." *Meyer*, 304 Ark. at 722. The court further noted that "the AAA membership consists of the superintendents and principals of the 495 member schools who are responsible for adopting the rules which regulate interscholastic activities at those schools." *Id.* The court went on to hold that AAA was a state actor "due to the close and symbiotic relationship between the AAA and the Arkansas public school system." *Id.*

For these reasons, a court should find that constitutional claims brought against the AAA under § 1983 are proper because the AAA is a state actor and a "person" who can be sued for purposes of § 1983.

Immunity from suit under § 1983

The AAA and its Board of Directors likely do not enjoy immunity from suit under § 1983 as do municipal corporations and other political subdivisions. *Wright*, 501 F.2d at 27. The *Wright* Court found:

> . . . the [AAA] was not created by the Constitution or by any statute of the State of Arkansas, and that it is not 'the State' or an 'agency of the State' as are agencies like the Arkansas State Highway Department, or the Arkansas Game & Fish Commission, or other administrative or regulatory agencies of a similar nature. Rather, the [AAA] is a regulatory agency established and supported by local school systems in the State on a voluntary basis. Thus, it is not immune from suit, and any decree that may be entered against it will operate upon its Executive Committee and Executive Director.

Id.

As for the AAA's Board of Directors, a court could find that the Board members are immune from civil damages based on qualified immunity. *See Peterson v. Independent School Dist. No. 811*, 999 F. Supp. 665, 674 (D. Minn. 1998) (finding that a school district superintendent was immune from civil damages when his conduct did not violate clearly established statutory or constitutional rights of another of which a reasonable person would have known). However, qualified immunity applies only to monetary damages and not to requests for injunctive relief. *Grantham v. Trickey*, 21 F.3d 289, 296 (8th Cir. 1994). For these reasons, suit under § 1983 is possible against the AAA's Board of Directors, at least for injunctive relief.

Equal Protection Claim

One type of claim that typically is brought by plaintiffs against state high school athletic associations is an equal protection claim pursuant to § 1983. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]o the extent that rules are adopted by the AAA they must satisfy constitutional principles as applied and may not impinge on due process or equal protection rights." *Arkansas Activities Ass'n v. Meyer,* 304 Ark. 718, 723 (Ark. 1991). "[A] program of interscholastic sports, '*after having been provided,*' . . . (original emphasis), must be administered without violation of the Fourteenth Amendment, at least if the case involves an equal protection claim . . . In other words, participation in interscholastic sports, even if not a constitutional right, is perhaps a non-constitutional 'privilege' protected by the Fourteenth Amendment." *Robbins by Robbins v. Indiana High School Athletic Ass'n, Inc.*, 941 F. Supp. 786, 791 (S.D. Ind. 1996) (citing *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970)) (internal citations omitted).

"Participation in interscholastic athletics is an important part of the educational process. Nonetheless, education has not been deemed a fundamental right under the fourteenth amendment requiring application of strict judicial scrutiny." *In re U.S. ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (citing *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 29-39 (1973)). "Since athletes are not a suspect class and no fundamental right is impinged by applying the rule to athletics and not to other school activities, the standard of judicial scrutiny which should be applied is the rational relationship test." *Id.* at 152 (citing *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970)). Under the rational basis test, the reason for state action need only be rationally related to a legitimate state purpose. *Id.* "If the classification

has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

"Once a rational relationship exists . . . judicial scrutiny must cease. Whether the rule is wise or creates undue individual hardship are policy decisions better left to legislative and administrative bodies. Schools themselves are by far the better agencies to devise rules and restrictions governing extracurricular activities. Judicial intervention in school policy should always be reduced to a minimum." *In re U.S. ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 152-53. In cases where a rational relationship exists, district courts have been "reluctant to embroil [themselves] in the day-to-day decisions of teachers, coaches and school administrators." *Wooten v. Pleasant Hope R-VI School Dist.*, 139 F. Supp. 2d 835, 843 (W.D. Mo. 2000).

Examples of Policies that were Rationally Related to Legitimate State Interests:

(1) *Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970). The Louisiana athletic association rule counted a repeated grade against a student's athletic eligibility when the cause of repeating the grade was either voluntarily or because of academic failure. The Fifth Circuit Court of Appeals held that the association's rule was rationally related to the legitimate state interest to minimize the hazard of having usual high school athletes competing with older, more skilled players.

(2) *Arkansas Activities Ass'n v. Meyer*, 304 Ark. 718 (Ark. 1991). The Arkansas Athletic Association had a similar rule for students who repeated a grade, and included a grandfather clause for students who repeated a grade before the new rule was enacted. The Arkansas Supreme Court held that the AAA's policy and grandfather clause was rationally related to the legitimate interest of keeping younger players safe by keeping older players from continuing to play by repeating a grade.

Here, a claim for equal protection would be based on the separation of two high schools from the same school district into different conferences, and the inequity of long travel in comparison to many districts that do not carry similar burdens and expense. A court would apply

rational basis review to determine if the AAA conference classifications are rationally related to a legitimate state interest.

Due Process Claim

The second type of claim that has been brought by plaintiffs against state high school athletic associations is a due process claim pursuant to § 1983. In *Barnhorst v. Missouri State High School Activities Ass'n*, the district court found that plaintiff's claim of arbitrariness "might be construed" as a due process claim under the 14th Amendment. 504 F. Supp. 449, 464-65 (W.D. Mo. 1980). The court further stated that "[i]t is now clear that a student's interest in a public education is a 'property' interest which cannot be deprived without the provision of notice and hearing procedures which comport with the Due Process Clause of the Fourteenth Amendment." *Id.* at 465 (quoting Goss v. Lopez, 419 U.S. 565, 573-76 (1975)). The court also noted that "participation in interscholastic athletic competition is . . . an important component of a modern education, and thus it may be argued that such competition is entitled to the procedural safeguards required by the Due Process Clause." *Id.* However, since the *Barnhorst* decision, the district court in *Wooten v. Pleasant Hope R-VI School District* found that "students do not have a cognizable property interest in extracurricular activities." 139 F. Supp. 2d 835, 842 (W.D. Mo. 2000) (citing cases).

To make a due process claim against the AAA based on arbitrariness of a policy, the District would need to show that the students have a cognizable property interest in extracurricular activities.

State Law Claim for Arbitrariness

The final type of claim that has been brought by plaintiffs against state high school athletic associations is a state law claim based on the arbitrariness of a policy. The Arkansas Supreme

Court addressed this type of claim in *Meyer*. "The power of the courts to review the actions of voluntary associations is extremely limited. Courts should interfere with association decisions only 'in case of fraud, lack of jurisdiction, or the invasion of property or pecuniary rights or interests.'" *Meyer*, 304 Ark. at 722 (quoting *Bruce*, 189 S.E.2d at 819). "[T]he decisions of associations and their tribunals will be accepted by the Courts as conclusive 'in the absence of mistake, fraud, illegality, collusion, or arbitrariness.'" *Id.*; *see also Barnhorst*, 504 F. Supp. at 463-65 (discussing a similar state law claim for arbitrariness under Missouri law).

In holding that the AAA's decision was not arbitrary, the *Meyer* court reasoned that the AAA policy was "uniformly applied by" the AAA to all students and had "a legitimate reason for its genesis . . . ." 304 Ark. at 725. In analyzing a school transfer policy by the Missouri State High School Activities Association, the *Barnhorst* court reasoned that the policy was not arbitrary because it was "supported by rational grounds and justifications." 504 F. Supp. at 463. Based on the analysis in *Meyer* and *Barnhorst*, a court would likely apply similar reasoning to both an equal protection claim and a state law claim for arbitrariness.

Similar Cases from Arkansas State Courts

(1) *Bryant School District v. Arkansas Activities Association*, 60CV-13-4185, Pulaski County Circuit Court (2013). Bryant School District ("Bryant") filed suit against the AAA alleging that the AAA abused its discretion and acted arbitrarily, capriciously and discriminatorily with no rational basis for violating the geographic requirements for reclassification in the AAA Handbook. Bryant specifically alleged that Bryant was improperly reclassified into the 7A/6A Central conference, when it was previously in the 7A/6A South. Bryant argued that two Little Rock high schools were placed in the 7A/6A South, while Bryant was moved to the 7A/6A Central, which resulted in longer travel times for Bryant's athletic teams. Bryant requested a preliminary injunction and that Bryant remain in the 7A/6A South. Judge McGowan denied Bryant's preliminary injunction. Judge McGowan reasoned that Bryant's proposed reclassification would violate the AAA's rules because it would leave Bryant as the only 7A school in 7A/6A South. Judge McGowan further reasoned that, if the schools were reclassified, other schools would experience similar harms due to travel changes and require the court to determine which schools should bear the impact of the conference reclassification. Judge McGowan concluded that "[t]he scenario before the

Court is illustrative of why courts have been extremely limited in their ability to review the actions of voluntary associations, notably the AAA, and severely diminishes the persuasiveness of Bryant's argument that it was suffer irreparable harm."

(2) *Van Buren School District v. Arkansas Activities Association*, 17CV-10-648, Crawford County Circuit Court (2010). Van Buren School District ("Van Buren") field suit against the AAA alleging that it was improperly reclassified into the 7A/6A Central for 2010-2012, even though Van Buren was still a 6A school. Specifically, Van Buren argued that only two 6A schools were reclassified into the 7A/6A Central, while six 6A schools were reclassified into the 7A/6A East, in addition to only two 7A schools. Van Buren argued the reclassification was unfair, arbitrary, and capricious conduct under the Equal Protection Clause because it forced Van Buren, a 6A school, to compete against 7A schools who had more students. The case was transferred to Pulaski County Circuit Court and then dismissed pursuant to Van Buren's nonsuit.

Similar Case from Wisconsin State Court

In a similar case from Wisconsin, Slinger School District ("Slinger") brought a suit against the Wisconsin Interscholastic Athletic Association ("WIAA") because the WIAA reclassified Slinger into a different athletic conference. *School District of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 563 N.W.3d 585, 586 (Wis. Ct. App. 1997). Slinger alleged that the reclassification would require Slinger athletic teams to travel greater distances to compete in events and compete against schools with significantly larger enrollments. *Id.* Slinger specifically alleged that it had a contractual right to a "reasonable" conference affiliation. *Id.* Slinger requested a preliminary injunction to stop the WIAA from implementing the conference reclassification policy. *Id.* The trial court granted the preliminary injunction and ordered the WIAA to place Slinger in an athletic conference reasonably close Slinger that contained other schools of comparable size offering similar programs. *Id.* The trial court also found that the WIAA had not followed proper conference reclassification procedures. *Id.*

On appeal, the Wisconsin Court of Appeals determined that the trial court had erroneously granted Slinger's request injunction because the trial court went beyond its authority by ordering

the WIAA to place Slinger in a particular conference. *Id.* at 589. The Court of Appeals also found that, based on the WIAA's constitution, it had wide discretion in making conference reclassification decisions, including requiring schools to travel greater distances if necessary. *Id.* at 591. Finally, the Court of Appeals held that Slinger did not have a contractual right to stop the conference reclassification because all of the member schools gave the WIAA the power to make reclassification decisions. *Id.*

Even though the facts of *Slinger* are similar to the current situation, the Slinger School District brought a contractual claim, which is different than the claims proposed here. Further, the trial court in *Slinger* granted a preliminary injunction that went beyond the status quo, which is typically the framework for a preliminary injunction.

Travel Distances Based on the AAA 2020-2022 Conference Reclassification

Based on the AAA 2020-2022 conference reclassification, Fort Smith Northside ("Northside") is required to travel longer distances compared to all other 7A schools. With Northside in 7A Central, the longest travel distance is to Bryant, which is 170 miles (2 hour 30 minute drive).[1] Excluding Northside, Bryant has the longest travel distance in 7A Central, with 43.9 miles (51 minute drive) to Conway and 44.1 miles (49 minute drive) to Cabot. If Northside were placed in 7A West, the longest travel distance would be 88.5 miles (1 hour and 47 minute drive) to Bentonville West. For the current 7A West, Fort Smith Southside ("Southside") currently has the longest travel distance to Bentonville West at 88.5 (1 hour and 47 minute drive). Besides the Fort Smith schools, Bentonville West has the longest travel distance to Fayetteville at 33 miles (47 minute drive).

In comparison to 7A schools, the 6A schools have significantly longer drive times. In 6A East, El Dorado has the longest travel distances in the conference, including to Jonesboro at 250 miles (3 hour and 59 minute drive), Marion at 253 miles (3 hour and 58 minute drive), and West Memphis at 249 miles (3 hour and 55 minute drive). In 6A West, several schools have long travel distances. Mountain Home is 207 miles from Lake Hamilton (3 hour and 54 minute drive) and 195 miles from Greenwood (3 hour and 37 minute drive). Siloam Springs also has long travel distances to Benton at 234 miles (3 hour and 33 minute drive) and Lake Hamilton at 203 miles (3 hour and 41 minute drive).

[1] Drive time based is based on speed limits for the fastest route. The drive times for students on a bus would likely take longer because school buses typically drive slower than the speed limit on the highway.