

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV026975-910

ROLANDA BRANDON, on behalf of F.B.,
a minor,

Plaintiff,

v.

NORTH CAROLINA STATE BOARD OF
EDUCATION and NORTH CAROLINA
DEPARTMENT OF PUBLIC
INSTRUCTION,

Defendants.

**ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION**

THIS MATTER coming on for hearing and being heard by the Honorable A. Graham Shirley, II, Superior Court Judge Presiding at the October 1, 2024 session of Wake County Civil Superior Court, and the same being heard on October 1, 2024, upon the application of Plaintiff for a Preliminary Injunction to enjoin the Defendants from enforcing a rule, codified at 16 NCAC 06E .0208(b), *see also* State Board of Education policy ATHL-008 (the “Temporary Rule”), deeming students ineligible to participate in interscholastic athletics on behalf of a North Carolina public school after entering into an agreement for the use of their names, images, and likenesses for commercial purposes. All parties were present in Court. Plaintiff was represented by Michael A. Ingersoll and Matthew F. Tilley of Womble Bond Dickinson (US) LLP; Defendants North Carolina State Board of Education (“State Board”) and North Carolina Department of Public Instruction were represented by Todd Russell and Allison Hawkins of the North Carolina Department of Justice.

Having fully considered Plaintiff's Motion, the Amended Complaint, the affidavits, memoranda of law and incorporated exhibits supporting and opposing the Motion submitted by the parties, relevant case law and statutes, and argument of counsel, for the reasons set forth below the Court hereby GRANTS Plaintiff's Motion.

FINDINGS OF FACT

1. On September 22, 2023, the North Carolina House of Representatives passed Senate Bill 452. That same day, the bill passed the Senate unanimously, and on October 3, 2023, became law without the Governor's signature.

2. Among other things, Senate Bill 452 assigns responsibility for making rules governing interscholastic athletics at public schools to the State Board of Education. *See generally* 2023 N.C. Sess. L. 133, Parts XVII-XX. It then directs the State Board to adopt temporary rules under the Administrative Procedure Act ("APA") for the 2024-25 school year and a Permanent Rule for the 2025-26 school year and beyond. *See* 2023 N.C. Sess. L. 133, §§ 19. (a), (b).

3. With respect to name, image, and likeness, Senate Bill 452 directed the State Board to "adopt rules governing high school interscholastic athletic activities conducted by public school units" including "[s]tudent amateur status requirements, including rules related to use of a student's name, image and likeness." 2023 N.C. Sess. L. 133, § 17. (a) (N.C. Gen. Stat. § 115C-407.55(1)(h)).

4. The General Assembly, in revising N.C. Gen. Stat. § 115C-407.55, expanded the existing statute in some instances, such as including enrollment in the section regarding transfers, and also by placing restrictions on eligibility to play, N.C.

Gen. Stat. §§ 115C-407.55(1)(b)(1)-(2); adding attendance requirements, *id.* § 115C-407.55(1)(c); adding biological participation requirements, *id.* § 115C-407.55(1)(e); adding recruiting limitations, *id.* § 115C-407.55(1)(f); adding a section on hardship exceptions, *id.* § 115C-407.55(1)(g); and adding amateur participation requirements related to athletes' use of their names, images, and likenesses, *id.* § 115C-407.55(1)(h).

5. On July 1, 2024, the State Board's Temporary Rule became effective.

6. The Temporary Rule defines "name, image, or likeness" or "NIL" as "the use of a student's name, image, or likeness for commercial purposes and in exchange for compensation to the student. Compensation may include cash, in-kind gifts, or other tangible benefits to the student." 16 NCAC 06E .0208(a).

7. The Temporary Rule states:

No student participating in interscholastic athletics shall enter into any agreement to use the student's name, image, or likeness in any of the following ways:

- (1) Public appearances or commercials.
- (2) Autograph signings.
- (3) Athletic camps and clinics.
- (4) Sale of non-fungible tokens ("NFTs").
- (5) Product or service endorsements.
- (6) Promotional activities, indulging in-person events and social media advertisements.

16 NCAC 06E .0208(b).

8. Subject to enumerated exceptions, the Temporary Rule also restricts public school students from participating in interscholastic athletics after graduation from high school, signing a professional contract, or "[r]eceiving remuneration as a

participant in an athletic contest[.]” 16 NCAC 06E .0208(c). The Temporary Rule further provides that a student will not “be deemed ineligible” for receiving payment “by an administering organization, [public school unit], or athletic booster club affiliated with the student’s school or [public school unit] for essential expenses arising from a specific interscholastic athletic contest in which the student participates . . . [.]” or “for receipt of a nominal, standard fee or salary for instructing, supervising, or officiating an organized youth sports program, recreational activities, playground, or camp, whether or not affiliated with a [public school unit].” 16 NCAC 06E .0208(d), (e).

9. Plaintiff’s son, F.B., a minor and resident of Guilford County, is one of the nation’s top-rated high school football recruits.

10. F.B. currently has offers from third-parties to license his name, image, or likeness in exchange for financial compensation.

11. Under the Temporary Rule, F.B., however, will lose his eligibility to participate in interscholastic athletics at his public high school if he enters into agreements with these third-parties to license his name, image, or likeness for commercial purposes.

12. On August 23, 2024, Plaintiff, on behalf of F.B., commenced this action in the Superior Court for Wake County pursuant to the North Carolina Declaratory Judgments Act, N.C. Gen. Stat. § 1-253, *et seq.*, seeking a declaration that the Temporary Rule is invalid and a preliminary and permanent injunction enjoining the enforcement of the Temporary Rule. Plaintiff’s original complaint was accompanied

by a motion for preliminary injunction pursuant to Rule 65 of the North Carolina Rules of Civil Procedure seeking to preliminarily enjoin the Temporary Rule pending a final judgment.

13. On September 5, the State Board proposed a permanent rule which, if adopted, would be effective July 1, 2025, and codified at 16 NCAC 06E .0211 (the “Proposed Permanent Rule”). The Proposed Permanent Rule permits students to use their names, images, and likenesses for commercial purposes and still participate in interscholastic sports, subject to certain restrictions.

14. Plaintiff filed an Amended Complaint on September 13, 2024.

15. The parties submitted their briefs on the instant Motion on September 26, 2024, and argument was held before the undersigned on October 1, 2024, in Wake County Superior Court.

CONCLUSIONS OF LAW

A. Exhaustion of Administrative Remedies and Subject Matter Jurisdiction.

1. Parties generally must exhaust their administrative remedies prior to instituting an action in the courts of this State against an agency of this State. This is so because “[w]hen the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts.” *Jackson v. N.C. Dep’t of Hum. Res. Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903–904 (1998). “On the other hand, if the remedy established by the NCAPA is inadequate, exhaustion is not required.” *Id.* at 186, 505 S.E.2d at

904. The burden of establishing that an administrative remedy is inadequate is on the party claiming inadequacy, and that party must allege the inadequacy in their complaint. *Kane v. N.C. Teachers' & State Emps. Comprehensive Major Med. Plan*, 229 N.C. App. 386, 391, 747 S.E.2d 420, 424 (2013). “An action is properly dismissed under the Rule for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies.” *Bryant v. Hogarth*, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271 (1997).

2. The NCAPA provides that “[o]n request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.” N.C. Gen. Stat. § 150B-4(a).

3. The NCAPA also provides, however, that a person aggrieved by a temporary rule—which is the category of rule at issue—“may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes[,]” and that “[f]iling a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action” for declaratory judgment under this G.S. 150B-21.1. N.C. Gen. Stat. §§ 150B-21.1(c), (c1).

4. It is well established that, “when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls.” *High Rock Lake Partners, LLC v. N.C. Dep’t of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300 (2012).

5. General Statute 150B-4 is a general pronouncement of the requirements of a party aggrieved an agency's rule to first seek a declaratory ruling from the agency as to the validity of its rule. Notably, G.S. 150B-4 also requires that the agency "shall prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued." The State Board of Education has not established such procedures nor published them in its rules.

6. Nevertheless, the Court concludes that, as a specific statute, N.C. Gen. Stat. § 150B-21.1 controls in this circumstance.

7. Pursuant to N.C. Gen. Stat. §§ 150B-21.1(c) and (c1), Plaintiff was entitled to file this declaratory judgment action and was not required to seek a declaratory ruling regarding the Temporary Rule prior to doing so.

8. Accordingly, the Court has jurisdiction over the subject matter of this action.

B. Preliminary Injunction.

9. "A preliminary injunction may be issued . . . [w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff." N.C. Gen. Stat. § 1-485(1). The purpose of a preliminary injunction is to preserve the *status quo* pending a final resolution of the merits. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983)).

10. A preliminary injunction is an extraordinary measure, and should be

issued when the plaintiff shows (1) a likelihood of success on the merits, and (2) that it is likely to sustain irreparable loss unless the injunction is issued or, “if, in the opinion of the Court, issuance is necessary for the protection of plaintiff’s rights during the course of litigation.” *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 760-61.

11. Likelihood of success means a “reasonable likelihood[.]” *Id.*

12. An injury is irreparable if it is “real and immediate[.]” *Daimler Chrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586, 561 S.E.2d 276 (2002), but not necessarily “beyond the possibility of repair or possible compensation in damages[;]” rather, it is harm “to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.” *A.E.P.*, 308 N.C. at 407, 302 S.E.2d at 763 (emphasis in original).

13. The issuance of an injunction is “a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980).

*i. **Likelihood of success on the merits.***

14. All people, including public school athletes, own their names, images, and likenesses. The right for one to control the use of their name, image, or likeness is enforceable under North Carolina law. *See, e.g., Renwick v. News and Observer Publ’g Co.*, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984) (North Carolina recognizes a claim for invasion of privacy by means of “appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness[.]”).

15. Although the State Board has authority to make rules governing the administration to public schools, that power must comply with the limits imposed by applicable statutes. *See* N.C. CONST. art. IX, § 5 (providing that the State Board’s power to make rules governing the administration of public schools is “subject to laws enacted by the General Assembly.”) *Id.*; *see also* N.C. Gen. Stat. § 115C-12 (similar).

16. Our Supreme Court reiterated that point in *N. Carolina State Bd. of Educ. v. State*, 371 N.C. 149, 163, 814 S.E.2d 54, 63 (2018). In rejecting the State Board of Education’s argument that it was not required to submit its proposed rules to the North Carolina Rules Review Commission, the Court held that “a review of the history of the relevant amendments to the constitution does not indicate that the document’s framers intended that the State Board would have the unbridled power to adopt rules and regulations of its own volition.” *Id.* Instead, the State Board may only adopt rules in compliance with the applicable statutes. N.C. CONST. art. IX, § 5.

17. “When the language of a statute is clear and without ambiguity, it is the duty of [courts] to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.” *Fid. Bank v. N.C. Dep’t of Revenue*, 370 N.C. 10, 18 (2017). “When interpreting a statute, a court must ‘give every word of the statute effect, presuming that the legislature carefully chose each word used.’” *State v. Daw*, 904 S.E.2d 765, 774 (N.C. 2024) (quoting *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641 (2009)).

18. “Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that

the legislature carefully chose each word used.” *N.C. Dep’t of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641 (2009). “Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.” *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297 (2014).

19. Senate Bill 452 is unambiguous. It does not give the State Board unfettered discretion to promulgate any NIL rule it wishes or to decide whether public high school athletes should be allowed to license the use of their NIL at all. Rather, Senate Bill 452 directed the State Board to adopt rules related to use of a student’s name, image, and likeness through the imposition of rules or guardrails related to that use. The State Board of Education was not, however, authorized to altogether prohibit students’ use of their names, images, and likenesses.

20. Further, the Court “must be guided by the ‘fundamental rule of statutory construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other.” *Martin v. N.C. Dep’t Health & Hum. Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm’n v. Sec. Nat’l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). In North Carolina, “[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.” *N.C. Dep’t of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675

S.E.2d 709, 711 (2009) (internal quotation marks omitted) (quoting *Rodriquez v. United States*, 480 U.S. 522, 525, 107 S. Ct. 1391 (1987)).

21. When read as a whole, Senate Bill 452’s drafting adds express requirements and limitations the State Board must include on some rule categories, while others are drafted in a way that provides more rulemaking flexibility within the directive given by the General Assembly. *Compare, e.g.*, N.C. Gen. Stat. §§ 115C-407.55(1)(b)(1)-(2) *with id.* § 115C-407.55(c).

22. Given this, the General Assembly’s deliberate inclusion of “rules related to the use” indicates the General Assembly’s intent that public school athletes would make use of their names, images, and likenesses—otherwise, the General Assembly could have listed any number of limiting subparagraphs, as it had done elsewhere in Senate Bill 452.

23. Therefore, the Court concludes that Plaintiff, on behalf of F.B., has a substantial likelihood of succeeding on the merits of her claims that Senate Bill 452 directs the State Board of Education to adopt rules (i) that allow public school athletes to use their names, images, and likenesses for commercial purposes and (ii) put in place guardrails to regulate that use.

ii. Irreparable harm.

24. The Temporary Rule expressly provides that “[n]o student participating in interscholastic athletics shall enter into any agreement to use the student's name, image, or likeness” in the manners prescribed therein. 16 NCAC 06E .0208(b).

25. Therefore, the Temporary Rule prevents public school athletes not only from receiving compensation from the use of their names, images, and likenesses, but from entering into an agreement for that use in the first instance.

26. F.B. is restricted by the Temporary Rule from entering into at least two written offers to use his name, image, and likeness for commercial purposes in order to remain eligible to participate in interscholastic athletics at his public high school. The Temporary Rule is the only reason F.B. cannot enter into these agreements to use his name, image, and likeness.

27. This harm is real, immediate, and will continue absent an injunction enjoining the enforcement of the Temporary Rule.

28. The Court therefore concludes that F.B. will be irreparably harmed absent an injunction enjoining the enforcement of the Temporary Rule.

iii. The public interest and balancing of the equities.

29. Because the State Board exceeded its limited authority under Senate Bill 452 in adopting the Temporary Rule in a manner that restricted public school athletes' use of their names, images, and likenesses, Defendants will not be harmed by enjoining the enforcement of the Temporary Rule.

30. The Court concludes that the public interest is served by enjoining the enforcement of the Temporary Rule. The public has a clear interest in enjoining the effectiveness of administrative rules passed in excess of statutory authority, such as the Temporary Rule.

31. The Court further concludes that a balancing of the equities favors enjoining the enforcement of the Temporary Rule. The Temporary Rule conflicts with the clear directive of Senate Bill 452 and creates a disparity between interscholastic athletes who attend public schools and those who attend private schools in North Carolina. The latter may freely engage in the same activities the Temporary Rule forbids for public school athletes.

32. Therefore, the Court concludes that the public interest and a balancing of the equities is served by enjoining the enforcement of the Temporary Rule.

iv. The status quo ante.

33. The Court concludes that issuance of a preliminary injunction enjoining the enforcement of the Temporary Rule preserves the *status quo*.

34. Prior to the Temporary Rule, public school athletes were not barred from using their names, images, or likenesses for commercial purposes.

35. Specifically, 16 NCAC 06E .0204, which was formerly the State Board's rule on interscholastic athletics participation, barred public school athletes from "receiving remuneration as a participant in an athletic contest," with limited exceptions. 16 NCAC 06E .0204(f) (2023). Similarly, Rule 1.2.16 of the North Carolina High School Athletics Association ("NCHSAA"), titled "Amateur Rule," also stated that "[a] student or team shall be rendered ineligible if the student or team . . . [a]ccepts money or otherwise receive remuneration for participation in an athletic contest." See NCHSAA 2023-24 Handbook, Section 1, Rule 1.2.16.

36. Neither the State Board's previous Rule nor the NCHSAA's Rule 1.2.16, however, applies to independent, private licensing or endorsement agreements, like the agreements available to F.B. for the use of his name, image, and likeness, which are unrelated to participation in an athletic contest.

37. If the *status quo* prior to the Temporary Rule was a prohibition on the use of name, image, and likeness, the General Assembly could have directed the State Board to adopt only a permanent rule for the 2025-26 school year and extended the existing hypothetical prohibition until the permanent rule went into effect. However, in directing the State Board to adopt a temporary interscholastic athletics participation rule allowing for students' use of their name, image, and likeness for the immediate 2024-25 school year, the General Assembly indicated that the *status quo* was not a prohibition on students' use of their names, images, and likenesses.

38. Therefore, the Court concludes that the *status quo* prior to the Temporary Rule was not a prohibition on students' use of their names, images, and likenesses.

CONCLUSION

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that the Plaintiff's Motion for Preliminary Injunction is GRANTED. Defendants are hereby ENJOINED from enforcing State Board of Education Policy ATHL-008 § (b), codified at 16 NCAC 06E .0208(b).

It is ORDERED that the State Board of Education's Proposed Permanent Rule, attached to this Order as Exhibit A, shall be in effect until expiration of this injunction.

IT IS FURTHER ORDERED that this injunction shall continue until such time that the earlier of the following occurs: (i) the State Board shows to the Court a temporary or permanent rule substantially similar to the Proposed Permanent Rule attached as Exhibit A adopted by the State Board that permits the use of name, image, and likeness as required by N.C. Gen. Stat. § 115C-407.55(1)(h) and such rule goes into effect; (ii) the Proposed Permanent Rule attached hereto as Exhibit A goes into effect; or (iii) superseding legislation is passed and effective.

SO ORDERED this, the ^{11th} day of October, 2024.



The Honorable A. Graham Shirley, II
North Carolina Superior Court Judge

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