IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 25-0293

ZAYNE HERT; AMBER HERT and KELLY HERT, Legal Parents to Zayne Hert,

Plaintiffs and Appellants,

v.

THE MONTANA HIGH SCHOOL ASSOCIATION; BRIAN MICHELOTTI – EXECUTIVE DIRECTOR OF THE MHSA,

Defendants and Appellees.

APPELLEES' ANSWER BRIEF

On Appeal from the Montana Sixteenth Judicial District Court
Rosebud County, Cause No. DV 23-53
Before Hon. Nickolas C. Murnion (Retired) and Hon. Rennie L. Wittman

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COME NOW, Appellees Montana High School Association and Brian Michelotti – Executive Director of the MHSA, and hereby submit the following Answer Brief in the above-captioned matter.

I. STATEMENT OF THE ISSUES

Whether the District Court correctly concluded that Appellants' claims for declaratory judgment and injunctive relief are moot.

II. STATEMENT OF THE CASE

This case was initially filed on November 1, 2023, by Zayne Hert, the affected student, and his parents, Amber Hert and Kelly Hert. The Montana High School Association was not identified as a defendant in the action, though its Executive Director, Brian Michelotti, was so identified. In addition, the Appellants alleged claims against Robin Nansel, Principal of Colstrip High School, which were later dismissed.

In the original complaint, Appellants sought judicial review and declaratory relief declaring that Zayne Hert's constitutional right to participate in extracurricular activities had been violated, as well as preliminary injunctive relief enjoining MHSA from "blocking Plaintiff his constitutional right to participate in extracurricular activities" and permanently enjoining the MHSA "from implementing or enforcing the MHSA's decision banning [Zayne] from extracurricular activities." SDR 13–14. Appellants' requested relief remained the same in two amended complaints. SDR

036–037 and SDR 050–051. Appellants did not request injunctive relief in the form of enjoining MHSA from applying the rule, which rendered Zayne Hert ineligible to participate in high school sports during the 2023-2024 school year ("the Semester Rule") generally.

This Court scheduled a hearing on the preliminary injunction request on November 29, 2023; however, Michelotti filed a motion indicating that a necessary party, the Montana High School Association, was not included as a Defendant. Appellants filed a First Amended Complaint on November 27, 2023, identifying the Executive Board of the Montana High School Association as a defendant.

Again, the MHSA opposed the hearing on the basis that the Executive Board was not subject to suit and that any rulings that were not directed toward the Montana High School Association as an entity would not be binding on the organization. Because the Montana High School Association had not been identified as a defendant, this Court vacated the hearing on November 28, 2023. On November 29, 2023, Appellants filed a Second Amended Complaint, identifying the Montana High School Association as a defendant.

Both individual defendants, Brian Michelotti and Robin Nansel, filed Motions to Dismiss Plaintiffs' claims against them. On December 14, 2023, the Montana High School Association also filed a combined Motion to Dismiss and Brief in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction.

On January 4, 2024, the District Court set a hearing on Appellants' request for a preliminary injunction and the Montana High School Association's Rule 12(b)(6) Motion to Dismiss. The parties presented testimony, evidence, and argument on January 17, 2024, after which this Court determined several facts relevant to Appellants' claims based on the evidence presented and denied their Motion for a Preliminary Injunction, denied MHSA's Motion to Dismiss, and granted Nansel's Motion to Dismiss.

Both parties filed a motion for summary judgment on October 31, 2024. As Zayne Hert had graduated from Colstrip High School prior to October 31, 2024, the MHSA asserted entitlement to summary judgment based on the mootness of the Herts' claims, as well as a request for judgment on the merits.

On February 25, 2025, the District Court entered its order granting summary judgment for MHSA on the issue of mootness, stating that "[t]he issues presented and the request for declaratory judgment made by the Plaintiffs are completely moot, and Defendants are entitled to judgment as a matter of law." Appellees' App. B, at ¶ 14.

III. STATEMENT OF THE RELEVANT FACTS

The Montana High School Association is a non-profit corporation, the members of which are Montana high schools interested in encouraging, supervising, and regulating high school sports and other activities. To ensure fairness and

consistency in high school sports and to encourage students to concern themselves with their own academic success, the MHSA promulgates rules applicable to all students to promote participation and academic success. Member schools are obligated to adhere to MHSA's rules. SDR 052 (Art. I, Section (1)1.1d). In addition, the MHSA conducts training for member schools, including mandatory training regarding rules.

Here, the MHSA's eligibility rules rendered Zayne Hert ineligible to participate in high school sports as a fifth-year senior, who had exhausted eligibility during his first four years of high school. As noted in all three of Appellants' Complaints, Zayne was ineligible to participate in MHSA contests by virtue of his status as a fifth-year senior at Colstrip High School, having completed eight consecutive semesters at Colstrip High School after entering the ninth grade. *See* SDR 005–006, SDR 028-029 and SDR 042-043.

Zayne's favorite sport is basketball, and he hoped to play basketball beyond high school. Zayne played high school basketball during his freshman year in 2019–2020. During the 2020–2021 school year, Zayne opted for engaged remote learning at Colstrip High School but did not achieve sufficient grades to remain eligible to play basketball. The remote learning option was available to Zayne largely due to the COVID pandemic. *Id*. Amber Hert testified at the hearing that she and her husband kept Zayne home based on several COVID-related factors, including the

loss of childcare, a determination to keep their circle small, and reasons pertaining to Colstrip policies. *Hrg. Tran*., at ll. 33:12–34:20. Zayne began attending school in person during the 2021–2022 and 2022–2023 school years and played basketball during those years.

Though Zayne Hert did not play basketball due to his grades during the 2020–2021 school year, under MHSA's "Semester Rule," he was not eligible to participate in MHSA sports during the 2023–2024 school year during his ninth and tenth semesters at Colstrip High School. MHSA's straightforward eligibility rule limiting students to participation in athletic activities sponsored by schools with membership in the MHSA provides:

> A student will be eligible to participate in Association Contests for four (4) consecutive years [eight (8) consecutive semesters] after entering the ninth grade. Enrollment of twenty (20) pupil instruction days during a ninth grader's first semester in high school constitutes his/her first semester of attendance. A ninth grader who is enrolled fewer than twenty (20) pupil instruction days in his/her first semester of high school does not begin his/her eight (8) consecutive semesters unless he/she has participated during this time in an Association contest. Such a period of fewer than twenty (20) pupil instruction days is not considered to be "the last previous semester attended" under Section (2).

SDR 057.

Zayne was not eligible to compete by operation of the rule. Regardless, MHSA permits an application for waiver of an eligibility rule, and Zayne invoked his rights

under the appeal process. SDR 004–005. The applicable considerations for waiver of the application of a rule are explicitly stated in the By-Laws as follows:

> On appeal, the Executive Board may, at its sole discretion, waive or modify the application of a rule in emergency or exceptional circumstances if it determines that the application of a rule as written would not substantially serve the intent or purpose of the rule. However, in no event may a rule be waived or modified by the Executive Board unless all of the following conditions are affirmatively shown to clearly exist: a. The emergency or exceptional circumstances were entirely beyond the control of the student, the student's parents or guardians, and, if relevant, the student's school; and b. The granting of relief will not prejudice the rights or opportunities of other students or other member schools; and c. The granting of relief will not violate any parts of the underlying purpose of the rule involved.

SDR 054 (MHSA By-Laws, Art. I, Sec. 5.3).

The procedure permitted the MHSA Executive Board to consider evidence submitted before and during the Hearing by the party appealing an eligibility determination. Under the rules, the Executive Board votes regarding whether a waiver may be granted under the considerations of Art. I, Section 5.3, or whether the application of the rule was correct.

On August 16, 2023, after a video conference hearing, the MHSA Executive Board determined by unanimous vote that a waiver of the application of the Semester Rule would not be granted, and Zayne would not be permitted to participate in MHSA boys' basketball contests during the 2023–2024 school year. The Executive Board's determination on an appeal is final, and no further internal appeals or review

are permitted. The procedure conformed to MHSA By-Laws governing appeals and is described in. SDR 062–063 (MHSA By-Laws, Art. VII, Subsection B, Sec. 3).

On November 1, 2023, Appellants sued the executive director of the MHSA and Principal Nancel of Colstrip High School but failed to include the MHSA as a party to the proceedings, which was remedied with the Second Amended Complaint on November 29, 2023. SDR 001–023 and SDR 038-052. Appellants raised the constitutionality of Zayne's exclusion from high school sports during his senior year, arguing that he was constitutionally entitled to participate and that the MHSA's appeal process was an unconstitutional denial of due process. As noted above, the District Court denied injunctive relief, which would have permitted Zayne to play basketball during his last year of high school, though he had been eligible for the previous eight semesters.

The hearing on Zayne's application for injunctive relief did not result in an order allowing Zayne to play basketball during his 9th and 10th semesters in the 2023–2024 basketball season. Appellants did not immediately file an interlocutory appeal. In the Spring, while the District Court case was pending, Zayne graduated from high school, and the basketball season in which he sought to participate had concluded. Zayne is no longer in high school, cannot play basketball in MHSA-sanctioned sports, and pursues athletic endeavors at the post-secondary school level.

IV. STANDARD OF REVIEW

Procedurally, both parties filed motions for summary judgment. MHSA asserted the mootness of the Plaintiff's claims in its motion, as Zayne Hert, a high school student when the case was originally filed, was no longer eligible to participate in high school sports by virtue of his graduation. The District Court granted the MHSA's motion for summary judgment based on the mootness of Plaintiff's claims and did not opine further on the merits of the Plaintiff's or the Defendant's arguments relating to constitutionality. Dismissal was based on the justiciability of the claims.

As mootness and the justiciability of a case are questions of law, the Montana Supreme Court reviews the District Court's decision for correctness. *In Re Big Foot Dumpsters & Containers, LLC,* 2022 MT 67, ¶ 7, 408 Mont. 187, 507 P.3d 169 (*citing* *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 6, 405 Mont. 259, 494 P.3d 892 (citing *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, ¶ 13, 404 Mont. 89, 485 P.3d 731; *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455).

V. SUMMARY OF THE ARGUMENT

As the District Court dismissed the Herts' case based on mootness, this Court's review requires a determination of whether the District Court's conclusion regarding mootness was correct. Justiciability depends on a determination that a case

or controversy exists. Here, Zayne Hert's request to participate in the 2023–2024 basketball season is no longer justiciable because the season has concluded. Appellants' requests for relief from the Semester Rule were limited to requests for a determination that Zayne individually was deprived of a constitutionally protected interest in his participation in extracurricular activities. Appellants did not seek to invalidate the Semester Rule or the Rules governing the appeal procedures under the MHSA By-Laws.

The District Court properly stated and relied upon the Appellants' own statement of their claims as an assertion of constitutional claims as applied to Zayne Hert, not general unconstitutionality. Given the subsidence of conditions that would allow Zayne to participate during his senior year, the entire case has become moot.

Appellants' case did not fall within any exception to the mootness doctrine, as Zayne Hert's circumstances do not lend themselves to repetition. There is no reasonable expectation that Zayne Hert would be subjected to the same action by MHSA, given his graduation from high school and the conclusion of the season in which he sought to participate. Moreover, the matter does not rise to the level of becoming an issue of public importance, as the issue was unlikely to recur. Zayne Hert's circumstances were specific to the COVID pandemic and his family's determination to keep Zayne home for the duration of the 2020–2021 school year, rather than have him return to school for their own reasons.

The public interest exception to the mootness doctrine here is also undermined by the MHSA's compliance with due process, even without the requisite demonstration of a property or liberty interest, which requires only notice and an opportunity to be heard. Notice and opportunity to be heard were afforded to Appellants by the MHSA relative to Zayne's request for a waiver of the Semester Rule. Appellees contend that Appellants' due process arguments are not properly before this Court regardless, as the District Court's determination was based solely on mootness and Appellants failed to timely appeal the District Court's denial of the requested preliminary injunction. Revisitation of the January 25, 2024, decision here was not included in the Notice of Appeal and was not germane to the issue of mootness.

VI. ARGUMENT

A. The District Court Correctly Concluded that Appellants' Claims Were Moot

Mootness is a threshold issue that requires resolution before addressing the underlying dispute. *Grabow v. Montana High School Ass'n*, 2000 MT 159, ¶¶ 13-14, 3 P.3d 650, 300 Mont 227. A court's judicial power is limited to justiciable controversies and the Constitutional requirement that a case or controversy must exist throughout the matter for the court to retain jurisdiction. *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start Inc*., 2009 MT 362, 353 Mont. 201, 142 P.3d 881, ¶¶ 22-23.("…if the court is unable due to an intervening event or

change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot."). Even though a claim may have been justiciable when filed, a change in the circumstances after the filing of a Complaint can render a claim moot and subject the complaint to dismissal under Rule 12(b)(6) for failure to state a claim. *In re Big Foot Dumpsters*, ¶¶ 9-10. There, this Court held:

> Mootness is a concept of justiciability; when an issue presented at an action's outset ceases to exist or is no longer "live," or if, due to a change in circumstances or some intervening event, the court cannot grant effective relief, the issue is moot. "The fundamental question to be answered in any review of possible mootness is whether it is possible to grant some form of effective relief to the appellant." If no relief is possible, "[a]ny further ruling . . . would constitute an impermissible advisory opinion, 'i.e., one advising what the law would be upon a hypothetical state of facts or upon an abstract proposition.'"

In re Big Foot Dumpsters, ¶ 10 (internal quotes and citations removed)

Further, this Court also held:

> A question is moot if the controversy at the outset of the action has ceased to exist, or if the court is unable to grant effective relief due to a change in circumstances. Thus, a question that was not moot when posed to a district court may be mooted on appeal by changed circumstances that prevent this Court from fashioning effective relief.

City of Deer Lodge v. Fox, 2017 MT 129, ¶ 8, 387 Mont. 478, 395 P.3d 506 (internal citations omitted).

Appellants' prayers for relief sought a declaration that Zayne's right to participate in school sports outweighs any articulable state interest in the Semester

Rule[1] and that MHSA's actions violated Zayne's due process rights. In addition, Appellants sought an order invalidating MHSA's decision regarding Zayne's eligibility "during his senior year (2023–2024) and to permanently enjoin defendants from implementing or enforcing the MHSA's decision banning [Zayne] from extracurricular activities." SDR 050–051. Each of the Appellants' requests for relief pertains to Zayne's participation in school sports during the 2023–2024 school year, which has since concluded.

An active case or controversy is central to the jurisdictional question regarding whether a case is justiciable. As a result of the conclusion of the 2023–2024 school year and Zayne's graduation from high school, the prayer for relief is mooted; consequently, the District Court acknowledged that it lacked a jurisdictional basis to provide an opinion whether Zayne should be eligible to participate in MHSA sanctioned sports or to enjoin MHSA from enforcing its eligibility rules which precluded Zayne's participation in the 2023–2024 basketball season. As such, the complaint was correctly dismissed for mootness.

The District Court properly considered *Grabow* relative to the mootness question. In *Grabow*, this Court declined to consider the question of:

> Whether the District Court erred in ruling that MHSA's Eight Consecutive Semester Rule is reasonable and that the government's

[1] Appellants have since abandoned any claims that the Semester Rule is unconstitutional.

> interest in enforcing the rule outweighs Grabow's constitutionally protected right to participate in extracurricular activities.

Grabow, ¶ 3.

Grabow argued, as Zayne Hert also argued, that specific hardships restricted him from participating in MHSA-sanctioned sports during his first eight semesters of high school. Unlike Hert, Grabow immediately appealed and obtained a Supreme Court injunction against enforcement of the Semester Rule, pending disposition of Grabow's interlocutory appeal. Grabow participated in the 1999–2000 basketball season during which the parties completed briefing, including in March 2000. Upon receipt of supplemental briefing from the parties on the issue of mootness, this Court determined that Grabow's appeal was moot on the issues regarding whether his constitutionally protected interest in participating in extra-curricular activities was violated and whether the MHSA was precluded from adjudicating Grabow's eligibility and waiver request. *Id.*, at ¶ 12. This Court held:

> In the present case, the 1999–2000 basketball season was the only one in which Grabow claimed he had a future right to participate, and that season has now been completed. The initial grounds for application of the mootness doctrine to the preliminary injunction issue have therefore been met. And, in contrast to J.M., there has been no argument here that Grabow failed to meet the minimal standard of proof allowing him to petition for a waiver of the relevant MHSA rule. Inasmuch as they relate to the District Court's refusal to issue a preliminary injunction, we decline to consider the questions raised in Grabow's Issues 1 and 2, because those issues are now moot. ***In fact, we conclude that Issue 1 is now completely moot, and given that it relates to a waiver decision based upon Grabow's particular circumstances, is not one capable of repetition.***

Id., at ¶ 18 (emphasis added).

There is no substantive distinction between the arguments made by Grabow and Hert regarding the application of the Semester Rule, though their specific circumstances differed. Both were unable to participate in basketball during semesters of eligibility for reasons specific to their own experiences, and both ended up ineligible based on the exhaustion of eight semesters of eligibility under MHSA's rules.

Though this Court remanded part of Grabow's case for determination by the District Court, the preserved issue was pleaded in terms of whether a school district unlawfully delegated its own authority to the MHSA. This issue implicated the relationships between the MHSA and its member schools under Montana law and was properly presented and preserved by Grabow. *Grabow v. Montana High Sch. Ass'n*, 2002 MT 242, ¶ 21, 312 Mont. 92, 59 P.3d 14 (The issue considered was stated as "May the Livingston School District contract with the MHSA to consent to be bound by the MHSA's rules?"). Here, Appellants' requests for declaratory and injunctive relief were considerably more limited, do not implicate the constitutional authority of school districts and the MHSA, and are based on the application of MHSA rules to the facts of Zayne Hert's case. Broad pronouncements affecting school district contractual relationships with the MHSA were neither requested nor required here.

B. Appellants' Claims Do Not Fall Within Any Exception to the Mootness Doctrine.

There are exceptions to the mootness doctrine that could allow the claim to proceed, including public interest or if the issue at the heart of the case is capable of repetition. In this case, the exceptions do not apply.

Notwithstanding the fact that many Montana student athletes endured the same pandemic, Zayne and his parents testified about the impact of COVID on Zayne's grades and the adverse impact of remote learning on Zayne's grades and consequent eligibility for athletics during his third and fourth semesters of high school. *Hrg. Tr.*, at 33:12–34:20 and 48:12–25. Moreover, the Herts' presentation to the MHSA highlighted the impact of COVID on Zayne's high school experience. *Id*. Zayne's circumstances were entirely premised on the impact of a global pandemic on Zayne individually, rendering the public interest unaffected by Zayne's application for injunctive relief, and the likelihood of repetition of these same circumstances extremely remote. These contentions were repeated in the Appellants' complaints filed with the District Court.

The factual distinctions between future claims based on future academic ineligibility, combined with attending high school for a fifth year, and Zayne's pandemic-related academic challenges are significant. Zayne's challenges were unusual and bear no likely resemblance to any future applications for an eligibility waiver by other students. The remote learning decisions made by Zayne's parents,

and necessitated by the pandemic and family concerns, were unprecedented and unique under any view of this case. The novel circumstances leading to Zayne's academic ineligibility during his sophomore year, as well as the basis for his fifth-year attendance at Colstrip High School, are not an exception to the mootness doctrine because these circumstances do not lend themselves to repetition. Indeed, Plaintiff has not alleged otherwise.

The standard for applying the "capable of repetition" exception requires demonstration of specific elements relating to the complaining party (Zayne), specifically, not potentially affected individuals generally. The requisite elements of proof to support a "capable of repetition" exception are:

> …[A] party must show: (1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration of the action; and (2) there was a ***reasonable expectation the same complaining party would be subjected to the same action.*** *In re Mental Health of D.V.*, 2007 MT 351, ¶ 30, 340 Mont. 319, 174 P.3d 503; *Sch. Dist. v. Bd. of Pers. Appeals*, 214 Mont. 361, 364, 692 P.2d 1261, 1263 (1985) (citing *Sosna v. Iowa*, 419 U.S. 393, 400-01, 95 S. Ct. 553, 557-58, 42 L.Ed.2d 532 (1975)).

Meyer v. Jacobsen, 2022 MT 93, ¶ 10, 408 Mont. 369, 510 P.3d 52 (emphasis added).

Though the *Meyer* Court determined that the "capable of repetition" exception applied, it was only because of the "relaxed" standards applicable in election law cases. *Id.*, at ¶ 16. This is not an elections case, but one in which the Appellants' interests in Court intervention subsided when Zayne left high school. Zayne won't be subjected to the same action (denial of a request for a waiver of the Semester

Rule), having graduated from high school. Both elements must be demonstrated to invoke the exception, and neither is present here.

Zayne and his family had the opportunity to litigate the claim in their request for injunctive relief, which was delayed only by Appellants' failure to identify the correct party in their first two complaints. Appellants could have sought injunctive relief, discovery, and summary judgment well in advance of the conclusion of the basketball season, but did not.

Similarly, the public interest exception to the mootness doctrine only applies where: 1) the case presents an issue of public importance; 2) the issue is likely to recur; and 3) an answer to the issue will guide public officers in the performance of their duties. *Ramon v Short,* 2020 MT 69, ¶ 21, 399 Mont. 254, 460 P.3d 857.

As previously noted, the Appellants' claims for declaratory and injunctive relief were not stated as anything other than claims that would benefit Zayne Hert solely. The requests for relief pertained to the constitutional rights of Zayne Hert individually, and injunctive relief requests were limited to enjoining the enforcement of eligibility rules against him. Though Appellants did not articulate a request for relief declaring the Semester Rule unconstitutional in any of their complaints, Appellants expressly abandoned the argument that the MHSA's enforcement of the Semester Rule was somehow improper:

> Plaintiffs will stipulate to dismissing their claim that the Eight Semester Rule violates the Montana Constitution. Plaintiffs, however, assert that

> they are entitled to declaratory judgment on the issue that the MHSA's actions deprived Zayne of his constitutional interest in his education and associated extracurricular activities without the requisite constitutional due process.

SDR 116.

This concession followed MHSA's briefing addressing this Court's endorsement of academic eligibility standards for athletes wishing to participate in MHSA-sanctioned contests. See *J.M., Jr. v. Montana High Sch. Ass'n* (1994), 265 Mont. 230, 238, 875 P.2d 1026, 1031.

The Herts argue that the potential for future similar occurrences and the public interest require continued attention to the claims; however, Appellants' requests for relief belie these contentions. There is no prayer for relief that seeks to invalidate any applicable MHSA bylaw or rule. Appellants merely wished to suspend the rules as they pertained to Zayne Hert. *See* SDR 050–051. These requests establish definitively that once Appellants failed to get the requested relief, no further purpose or claim is served by continuing this litigation because no request has been made to require the MHSA to modify its rules or procedures to conform to Appellants' unreasonable expectations regarding procedure.

This Court has considered the requested relief to determine mootness – and found that a request for limited specific relief which cannot be granted renders a claim moot. As noted in *Meyer*:

> The Secretary therefore is correct that Meyer's claims as pled are moot because "the court is unable due to an intervening event or change in circumstances" to grant the relief Meyer's complaint sought "or to restore the parties to their original positions." *See Greater Missoula*, ¶ 23. *See also Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); *Ariz. Green Party v. Reagan*, 838 F.3d 983, 987-88 (9th Cir. 2016); *Libertarian Party v. Herrera*, 506 F.3d 1303, 1305 n.1 (10th Cir. 2007); *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005); *Misso v. Oliver*, 666 So. 2d 1366, 1368-69 (Miss. 1996) (all cases finding that requests for relief specific to a completed election were moot).

Meyer, ¶ 11.

The absence of any injunctive relief request for revisitation of MHSA rules or procedures or requests to establish minimum standards of review or due process relative to waiver requests undermines Appellants' claims for a "public interest" exception here. The District Court was asked only to address Zayne Hert's eligibility to play basketball during the 2023–2024 season, and he can no longer benefit from such a determination. Even if Appellants' arguments regarding due process afforded by the MHSA appeal procedure were properly before this Court as indicia of the "public interest" exception, Appellants cannot establish a failure of due process.

First, Zayne's right to participate in extracurricular activities is not a property or liberty interest. *See Dorwart v. Caraway*, 1998 MT 191A, ¶ 63, 290 Mont. 196, 966 P.2d 1121, *overruled on other grounds by Trustees of Ind. Univ. v. Buxbaum*, 2003 MT 97, 315 Mont. 210, 69 P.3d 663 ("In determining whether constitutional due process protections have been violated in a given case, we first address whether

a property or liberty interest exists which rises to a level accorded due process protection under the United States and Montana Constitutions.").

It is axiomatic that extracurricular activities are not explicitly protected by the Montana Constitution in the same way that educational opportunity is protected. *See* Mont. Const. Art. X, § 1. Participation in extracurricular activities is not a fundamental right. *Bartmess v. Board of Trustees* (1986), 223 Mont. 269, 273, 726 P.2d 801, 803.

Second, even if Zayne asserted an interest that requires due process protections, all that is required is notice and an opportunity to be heard. Appellants have failed to cite any fact or law that would support a claim for an evidentiary hearing, reasoned legal opinion, and Board issuance of a notice of all legal remedies associated with a denial of the waiver. MHSA's process satisfies due process, if any is required.

In *J.M. v. Montana High Sch. Ass'n*, the Montana Supreme Court considered the distinction between the due process rights accorded to a student protected under the Individuals with Disabilities in Education Act ("IDEA") and a student who claimed disability but was not on an IEP. The *J.M.* court considered a federal court determination that a disabled student's participation in extracurriculars, when identified as a "related service" in his Individualized Education Program ("IEP")

under 20 U.S.C. § 1413(a)(4)(B)(i), is "transformed into a federally protected right." *Id*., 265 Mont. at 238, 875 P.2d at 1031.

In *J.M.*, the student who was not on an IEP was deemed not entitled to the "particularized inquiry" triggered by the IDEA protection of the right to participate in high school athletics. This case is not directly on point; however, consistent with the more restrictive process pertaining to students who can demonstrate federally protected rights, MHSA employs a similar, specific set of standards in which the MHSA Board of Trustees reviews waiver applications for waiver based on the following criteria:

a. The emergency or exceptional circumstances were entirely beyond the control of the student, the student's parents or guardians, and, if relevant, the student's school; and

b. The granting of relief will not prejudice the rights or opportunities of other students or other member schools; and

c. The granting of relief will not violate any parts of the underlying purpose of the rule involved.

SDR 136 (¶ 11).

The process and criteria currently in use by MHSA are comparable to those cited with approval and deemed unnecessary for J.M., a student whose rights were ***not*** federally protected. *See J.M.,* 265 Mont. at 238–240, 875 P.2d at 1031–1032.

Certainly, if the process is deemed acceptable for a student whose rights were "transformed into a federally protected right" by virtue of his IEP, it is also acceptable in the case of a student, like Zayne, whose rights have not been so transformed.

C. Appellants' Arguments Regarding the Validity of the District Court's January 25, 2024, Order Denying Preliminary Injunction are Irrelevant and Untimely.

Though unrelated to mootness, Appellants rehash the constitutional issues determined in the January 25, 2024, Order denying Appellants' preliminary injunction request. In Appellants' Opening Brief, Appellants allege that "because the District Court's February 25, 2025, order incorporated all findings and conclusions from its January 26, 2024, order, necessary citations included herein reflect an appeal from both orders." Appellants' Opening Br., at 20.

From the beginning of this case, the basic facts were generally uncontested, and the Court relied on previously determined facts about which the parties generally agree. Indeed, Appellants do not materially argue with the factual findings made on January 25, 2024, but vigorously dispute the application of law to those facts.

Regardless, there are only a few facts necessary to support the District Court's dismissal of the case, each of which was uncontested:

1) Appellants requested declaratory and injunctive relief associated with Zayne's participation in the 2023–2024 basketball season;

2) Appellants did not request relief prohibiting application of the Semester Rule to all Montana students affected by it, but only as it applied to Zayne;

3) During the 2020–2021 school year, Zayne engaged in remote learning at Colstrip High School but did not achieve sufficient grades to remain eligible to play basketball. Zayne began attending school in person during the 2021–2022 and 2022–2023 school years and played basketball during those years.

SDR 050–051.

Additionally, as acknowledged by the District Court when it dismissed the case, Appellants did not appeal or seek a stay of the District Court's January 25, 2024, order denying the preliminary injunction request. Though interlocutory appeal of the January 25, 2024, Order would have been available under Montana law, *see Montana Cannabis Industry Ass'n v. State*, 2012 MT 201, ¶ 13, 366 Mont. 224, 286 P.3d 1161, Appellants did not seek review at the time. Moreover, Appellants did not appeal the January 25, 2024, order within the context of the above-captioned appeal either. The Notice of Appeal under consideration by this Court cites only the District Court's February 25, 2025, Order on Cross-Motions for Summary Judgment and Order Denying Plaintiff's Motion to Strike.

Due to untimeliness and irrelevance to whether Appellants' claims for relief are moot, the validity of the January 25, 2024, Order on the request for preliminary injunction, without interlocutory appeal, is not properly before this Court. Likewise,

the due process claims asserted by the Herts are not properly before this Court, as mootness was the only issue on which summary judgment was granted.

VII. CONCLUSION

Based on the foregoing, the District Court's conclusion regarding the mootness of the Herts' claims against the MHSA is correct. Consideration of the merits of the Herts' constitutional and due process arguments is unnecessary, given the fact that the Herts cannot demonstrate that there is any likelihood that Zayne Hert may be subjected to the same action in the future. As such, the public interest and recurrence exceptions to the mootness doctrine are not present.

Appellees respectfully seek affirmation of the District Court's findings in this regard.

Dated this 24th day of September, 2025.

KALEVA LAW OFFICE

By: *Elizabeth A. O'Halloran*
Elizabeth A. O'Halloran
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(a), I hereby certify that this Appellees' Answer Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and the word count, excluding tables and certificates, is 5,637 as calculated by Microsoft Word.

Dated this 24th day of September, 2025.

KALEVA LAW OFFICE

By: *Elizabeth A. O'Halloran*
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CERTIFICATE OF SERVICE

I, Elizabeth O'Halloran, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-24-2025:

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Dated: 09-24-2025