

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**B.P.J., by her next friend and mother,
HEATHER JACKSON,**

Plaintiff,

v.

**Civil Action No. 2:21-cv-00316
Honorable Joseph R. Goodwin, Judge**

**WEST VIRGINIA STATE BOARD OF EDUCATION,
HARRISON COUNTY BOARD OF EDUCATION,
WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION, W. CLAYTON BURCH
in his official capacity as State Superintendent, and
DORA STUTLER in her official capacity as
Harrison County Superintendent,
Defendants,**

And

**LAINIEY ARMISTEAD,
Defendant-Intervenor.**

**WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION'S
REPLY IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE
PLAINTIFF FROM OFFERING AS EVIDENCE THE ASSERTIONS CONTAINED IN
PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS**

Now comes West Virginia Secondary School Activities Commission (WVSSAC), by counsel, Roberta F. Green, Kimberly M. Bandy, Shannon M. Rogers and Shuman McCuskey Slicer PLLC, and replies to Plaintiff's Consolidated Opposition to State of West Virginia's, Defendant-Intervenor Lainey Armistead, and WVSSAC's Motions *in Limine* to Bar Plaintiff's Claims Related to Undisputed Facts (Dkt. Nos. 386, 395) (ECF No. 441) (Plaintiff's Response) as follows. WVSSAC agrees with Plaintiff that the pleading Undisputed Facts would likely have no role at trial. Further, WVSSAC agrees that if counsel would like to characterize 'facts' as undisputed in argument, that clearly is not evidence and could fall outside this process. However,

Plaintiff's Response does not address the overstatements and mischaracterizations WVSSAC identified in its Motion, each of which signals an imprecision and potential problem with characterizing facts.¹

WVSSAC's issue with the Undisputed Facts, then, is in the presentation of the alleged 'facts' themselves, which Plaintiff did not address in Plaintiff's Response. In the Undisputed Facts, Plaintiff has characterized evidence rather than presented it in its native form. WVSSAC understands and agrees that Plaintiff filed "Plaintiff's Statement of Undisputed Facts" (ECF No. 290) in support of Plaintiff's Motion for Summary Judgment (ECF No. 289), and that the Undisputed Facts is alleged to be a list of "facts" – the issue is that the Undisputed Facts are characterizations of facts, presented as if it were established or agreed-upon evidence.

In the Response, Plaintiff asserts that the Undisputed Facts (ECF No. 290) would have no role at trial, and that is arguably true *vis a vis* the pleading. However, facts appear in key junctures at trial, such as in the questions counsel ask of witnesses.² Plaintiff's Response does not address WVSSAC's assertion that some of the 'undisputed facts' are actually glosses or characterizations of fact or, indeed, argument characterized as fact. For instance, in its Motion, WVSSAC cited where, in the alleged Statement of Undisputed Facts, Plaintiff relies upon WVSSAC's statutory delegation and proclaims it 'controlling authority' without conducting any of the mandatory legal analysis of or under that concept.³ Plaintiff's Response does not address that issue.

Further, in its Motion, WVSSAC questions Plaintiff's assertion that purportedly WVSSAC decides eligibility appeals and that "WVSSAC's athletic handbook provides that it must comply

¹ *Boyd v. Univ. of Md. Med. Sys.*, 173 F.R.D. 143 n.8 (D. C. Md. 1997); *Federal Sav. & Loan Ins. Corp. v. Williams*, 599 F. Supp. 1184, 1214 (D.C. Md. 1984).

² *United States v. Roof*, 10 F.4th 314, 375 (4th Cir. 2021).

³ ECF No. 290 at ¶ 116. WVSSAC disputes that the Undisputed Facts are in whole or part 'undisputed' and reserved the right to plead further, as indicated.

with Title IX.”⁴ Plaintiff’s Response does not address WVSSAC’s argument that, in the Undisputed Facts, Plaintiff identifies as ‘fact’ issues that have yet to be proven: that is, Plaintiff fails to recognize or acknowledge that, as a matter of law, deciding eligibility appeals, absent more, does not create ‘controlling authority’ over federally funded programs so as to convert this private corporation into a state actor.⁵ WVSSAC renews its request that Plaintiff be specifically precluded from offering any such statements in questioning or arguments at trial, absent underlying support for same. Characterizing facts in questions is a bell that cannot be effectively un-rung,⁶ that requires repeated interruptions and objections – and that could be addressed affirmatively now with an order *in limine*.

To the extent Plaintiff seeks to offer any characterizations of the evidence offered in this case, drawing conclusions for the trier of fact and suggesting that a certain interpretation of evidence is ‘fact’ and undisputed, specifically to WVSSAC, several of these statements constitute argument rather than true facts, and have been disputed by WVSSAC.⁷ Several of these statements are addressed herein.

Because Plaintiff questions how these come into play at trial, WVSSAC asserts that counsel’s arguments, counsel’s questioning, counsel’s ‘evidence’ must all be based in the true facts adduced here. WVSSAC renews its Motion for an order *in limine*, precluding Plaintiff’s use of the alleged ‘undisputed facts’ and instructing all counsel to question witnesses only on true ‘facts’ and offer as evidence only those statements directly found in the record.

**WEST VIRGINIA SECONDARY SCHOOL
ACTIVITIES COMMISSION,
By Counsel.**

⁴ ECF No. 290 at ¶¶ 118, 119.

⁵ *Smith v. NCEAA*, 266 F.3d at 157.

⁶ *Carter v. Warden of Lieber Corr. Inst.*, 2021 U.S. Dist. Lexis 186074, *18 (D.C. S.C. 2021).

⁷ *See, e.g.*, ECF No. 298 at 9, 11.

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CERTIFICATE OF SERVICE

I hereby certify that I, Roberta F. Green, have this day, the 11th day of July, 2022, served a true and exact copy of the foregoing upon the Clerk of Court using the CM/ECF System, which will send notification of such filing to the following counsel of record:

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