Circuit Court for Howard County
Case No.: C-13-CV-23-000956

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 40

September Term, 2024

DUNCAN S. MORGEN-WESTRICK

v.

MARYLAND PUBLIC SECONDARY SCHOOLS ATHLETIC ASSOCIATION

Friedman,
Beachley,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 6, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Duncan S. Morgen-Westrick (appellant), a Maryland high school volleyball referee, filed a complaint against the Maryland Public Secondary Schools Athletic Association (the "Association" or appellee) in the Circuit Court for Howard County for declaratory judgment and injunctive relief. The Association filed a motion to dismiss for failure to state a claim. Following a hearing, the court granted the Association's motion without prejudice. Appellant subsequently filed a second complaint, and the Association again filed a motion to dismiss. Following a hearing, the court dismissed the second complaint with prejudice. Appellant presents the following questions on appeal, which we have rephrased and condensed for clarity[1]:

I. Did the circuit court properly conclude that certain Association PowerPoint slides on concussion protocols and hair adornments were not regulations?

II. Did the circuit court properly conclude that certain Association PowerPoint slides did not violate appellant's constitutional free speech rights?

[1] In his appellate brief, appellant presents the following questions:

1. Did the [c]ircuit [c]ourt apply the correct standards and case law for standing for a case brought under Maryland Code, State Government, § 10-125 and does [a]ppellant have standing?

2. Was [a]ppellee required to follow formal rulemaking processes under the Administrative Procedures Act when it issued the statements in question regarding concussions and hair adornments?

3. Do athletic officials have a duty of care towards youth athletes?

4. Can a motioner add or modify, and a court rule on, grounds in a surreply that were not in the original motion?

III. Did the circuit court erroneously dismiss appellant's second complaint with prejudice because the Association had not properly presented or supported its arguments?

For the following reasons, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant has been a Maryland high school volleyball referee since 2021. The Association governs athletic programs for students in Maryland's public secondary schools, and it operates under the State Department of Education, Division of Instruction.

To officiate any Maryland interscholastic volleyball games, there are two requirements. First, one must register as a member of the Beltway Region Volleyball Officials Association ("BRVO") and pay a fee. Appellant is a member in good standing of the BRVO. Second, one must annually complete an online Association sponsored "Rules Interpretation Clinic" (the "Clinic"). The materials for the training are prepared by the Association's Coordinator of Officials and the Association's Rules Interpreter. The Clinic is comprised of two units of material: one unit is the same across all sports, and the other is sport specific. The volleyball Clinic for 2022-2023 and 2023-2024 included PowerPoint slides that contained information about Maryland law on concussion protocols and hair adornments.

On July 24, 2023, appellant filed a complaint for declaratory judgment and injunctive relief against the Association. Appellant sought a declaration that the PowerPoint slides on concussions and hair adornments were invalid regulations because they did not comply with the rulemaking process of the Administrative Procedures Act ("APA"). *See* Md. Code Ann., State Government ("SG"), Title 10, Subtitle 1. Appellant

also sought to enjoin the Association from using the slides. On November 2, 2023, a hearing was held on the Association's motion to dismiss for failure to state a claim. Following the hearing, the circuit court dismissed the complaint without prejudice, finding that the PowerPoint slides were not regulations.

Four days later, appellant filed a second complaint for declaratory judgment and injunctive relief. Appellant again sought a declaration that the PowerPoint slides on concussions and hair adornments were invalid regulations because they did not comply with the APA and a declaration that sports officials have a duty of care when a youth athlete has a suspected concussion. He also added a new claim that the Association's slides on concussions and hair adornments infringed upon his First Amendment right by preventing him from advocating for the health and safety of student athletes. The Association again filed a motion to dismiss.

On February 7, 2024, a hearing was held. Following argument by the parties, the circuit court ruled from the bench and dismissed the complaint with prejudice. As with the first complaint filed by appellant, the circuit court similarly found that the Association's PowerPoint slides were not regulations but were "merely interpreting the law to give the public a clearer understanding of what the law requires." The court subsequently issued a written order dismissing the complaint with prejudice.

DISCUSSION

Standard of Review

We review the granting of a motion to dismiss de novo and determine whether the circuit court's decision was legally correct. *Grier v. Heidenberg*, 255 Md. App. 506, 520

(2022). On review, "we look only to the allegations in the complaint and any exhibits incorporated in it[.]" *Smith v. Danielczyk*, 400 Md. 98, 103-04 (2007). We also "presume the truth of all well-pleaded facts in the complaint, along with any reasonable inferences derived therefrom." *Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 72 (1998). "Dismissal is proper only if the complaint would fail to provide the plaintiff with a judicial remedy." *Reichs Ford Rd. Joint Venture v. State Rds. Comm'n of the State Highway Admin.*, 388 Md. 500, 509 (2005). If we disagree with the reasoning relied upon by the circuit court, we may still "affirm the judgment of a trial court to grant a motion to dismiss on a different ground than that relied upon by the trial court, as long as the alternative ground is . . . properly on the record." *Forster v. State, Off. of Pub. Def.*, 426 Md. 565, 580-81 (2012).

I.

The crux of this dispute is that appellant believes that the Association violated Maryland's APA when it created the PowerPoint slides on concussion and hair adornment protocols. He contends that the slides fall within the APA definition of regulation, and therefore, the slides must be adopted by formal APA rulemaking. The Association argues that appellant wrongly seeks to "equate training slides that implement existing law with 'regulations' that establish new law." The Association argues that the PowerPoint slides only "explained concussion protocols that have already been promulgated as regulations and highlighted the need for hair adornments to be reviewed on a case-by-case basis at the local school level to prevent discrimination based on hairstyle under amended

nondiscrimination statutes." For the reasons that follow, we shall affirm the judgment of the circuit court.

A. The Maryland Administrative Procedure Act

Maryland regulations are to be enacted in accordance with the procedures set forth in the Maryland APA. *See* SG § 10-101 *et seq.* "The purpose of the State APA is to provide a standard framework of fair and appropriate procedures for agencies that are responsible for both administration and adjudication of their respective statutes." *Coleman v. Anne Arundel Cnty. Police Dep't*, 369 Md. 108, 136 (2002) (quotation marks and citation omitted). In accordance with this purpose, the APA sets forth procedural mechanisms for the promulgation of regulations by executive branch agencies, "establishing a process known as 'notice and comment' rulemaking."[2] *Balfour Beatty Constr. v. Md. Dep't of Gen. Servs.*, 220 Md. App. 334, 356 (2014).

Under the APA, the word "regulation" is defined as:

[2] In *Balfour*, 220 Md. App. at 356, we set out the specific process as follows:

> A unit "may not adopt a proposed regulation" until it has sent a proposed draft to the Attorney General or unit counsel for approval as to legality, SG § 10-107(b), and also to the General Assembly's Joint Administrative, Executive, and Legislative Review Committee . . . SG § 10-110(c). Next, the proposed regulation must be published in the Maryland Register and be accompanied by a notice that: (1) states the economic impact of the proposed regulation on State and local government revenues and expenditures and on groups that may be affected by it, and (2) sets a date, time, and place for public hearing. For the next 30 out of the 45 days during which the regulation is published in the Maryland Register, the unit must accept public comment on the proposed regulation.

Once the proposed regulation is adopted, the agency "shall submit to the Administrator [of the Division] a notice of adoption, for publication in the Register." SG § 10-114(a).

(g)(1) . . . [A] statement or an amendment or repeal of a statement that:

(i) has general application;

(ii) has future effect;

(iii) is adopted by a unit to:

1. detail or carry out a law that the unit administers;

2. govern organization of the unit;

3. govern the procedure of the unit; or

4. govern practice before the unit; and

(iv) is in any form, including:

1. a guideline;

2. a rule;

3. a standard;

4. a statement of interpretation; or

5. a statement of policy.

SG § 10-101(g)(1). Maryland courts have consistently held that when an agency "does not formulate new rules of widespread application, change existing law, or apply [rules] retroactively to the detriment of an entity that had relied on the agency's past pronouncements," the rules are not regulations as contemplated by the APA, and the executive agency need not proceed through the formal rulemaking process. *Balfour*, 220 Md. App. at 357 (quotation marks and citations omitted). *Cf. Dep't of Health & Mental Hygiene v. Chimes, Inc.*, 343 Md. 336, 346-47 (1996) (recognizing that formal rulemaking is not required when an agency effectuates policies already enunciated in existing statutes and/or regulations).

We find *Maryland Ass'n of Health Maintenance Organizations v. Health Services Cost Review Commission*, 356 Md. 581 (1999) ("*HMO*") instructive. In that case, plaintiffs

sued Health Services Cost Review Commission alleging that it had exceeded its statutory authority by adopting by resolution an inflation adjustment system ("IAS") and applying it to certain facilities in violation of the APA. They argued that the IAS, "as a statement, standard and rule of Commission policy, with general application and future effect is indisputably a regulation under the APA." *Id*. at 599-600 (cleaned up). The circuit court dismissed some claims as not ripe for decision and granted summary judgment to the defendant on the remaining counts. *Id*. at 588. The Maryland Supreme Court agreed with the court's ruling that the Commission was not required to conduct formal rulemaking prior to implementing the IAS, and therefore, it had not violated the APA. *Id*. at 602.

In reaching this conclusion, the Court found helpful the reasoning in *Baltimore Gas & Electric Co. v. Public Service Commission,* 305 Md. 145, 168 (1986) ("*BGE*"). The Court summarized the *BGE* case as follows:

> when setting or approving rates for a particular entity, the government regulatory agency "is required to articulate the standards through which it applied the applicable law to the relevant facts in reaching its decision" and that "such standards will often have a degree of general application and future effect." The Court continued, "[t]o conclude, however, that every time an agency explains the standards through which it applies a statute . . . it is promulgating rules, . . . would be patently unreasonable." *Ibid*. We concluded in [*BGE*] that the agency had not abused its discretion by failing to promulgate its ratesetting standards through formal rulemaking, stating that "[t]his is not a case ... in which materially modified or new standards were applied retroactively to the detriment of a [regulated entity] that had relied upon the Commission's past pronouncements."

HMO, 356 Md. at 600-01 (quoting *BGE*, 305 Md. at 167, 169). The Court also found *Chimes* helpful, and summarized the *Chimes* case as follows:

> In *Chimes*, the Developmental Disabilities Administration (DDA) of the Maryland Department of Health and Mental Hygiene had contracted with

> Chimes, Inc. to provide community-based residential programs for persons with developmental disabilities. In order to control costs, the DDA instituted the Prospective Payment System (PPS). Under the PPS, payments to providers like Chimes were based on two categories of costs or "cost centers." *Chimes*, 343 Md. at 341. In 1994, the DDA applied a "growth cap," limiting growth in the second set of cost centers (administrative, general, capital, and transportation costs). Chimes filed a declaratory judgment action challenging the "growth cap" on the ground that the agency had violated the APA in failing to adopt the growth cap by formal rulemaking. The circuit court agreed with Chimes, declaring that the growth cap was invalid, but this Court reversed. Relying on the [*BGE*] case and the [*Consumer Prot. Div. Off. of Att'y Gen. v. Consumer Publ'g Co., Inc.*, 304 Md. 731 (1985)] case, we held that the DDA did not violate the APA by implementing the cap without formal rulemaking. The Court noted that the growth cap "did not formulate new rules of widespread application, change existing law, or apply new standards retroactively to the detriment of an entity that had relied on the agency's past pronouncements." *Chimes*, 343 Md. at 346.

HMO, 356 Md. at 601.

The Court found distinguishable the case relied on by the plaintiffs, *CBS Inc. v. Comptroller of Treasury*, 319 Md. 687 (1990). The Court summarized the *CBS* case as follows:

> *CBS* involved the method or formula used by the Comptroller of the Treasury for apportioning a part of CBS's taxable income to Maryland. Prior to 1980, CBS had computed its taxes according to a particular method which had been approved by the Comptroller. During an audit of CBS's tax return for the 1980-1981 tax year, however, the Comptroller insisted on changing the method. This Court held that the Comptroller was required to adopt the new method by rulemaking because it was a change in the Comptroller's generally applicable policy and was being applied retroactively to the detriment of the taxpayer. The Court distinguished our prior cases as follows (*CBS*, 319 Md. at 699-700):
>
> > "The effect of the Comptroller's audit was to announce a substantially new generally applicable policy with respect to apportionment of the network advertising income of national broadcasting corporations. That change, for practical purposes, amounted to a change in a generally applicable rule. Unlike the agency action in *Consumer Protection*, it *was* an effective

> 'change [in] existing law' and *did* 'formulate rules of widespread application.' 304 Md. at 756. Unlike the agency action in [BGE] it *was* 'a case . . . in which materially modified or new standards were applied retroactively to the detriment of a company that had relied upon the [agency's] past pronouncements.' 305 Md. at 169. Under these circumstances, we hold that the new policy had to be promulgated pursuant to the rulemaking procedures of the APA."

HMO, 356 Md. at 601-02.

The *HMO* Court, in turning to the facts before it, stated that the Commission's decision did not support plaintiffs' argument because the Commission's use of the IAS did not represent a change in the policies or standards applied by the Commission, nor was it retroactively applied to the detriment of the regulated hospitals. *Id*. at 602. Rather, the IAS "reflects policies set forth by the General Assembly." *Id*. As such, "the Commission's use of the IAS is much more like the use of agency policies or methods in the *Chimes* [and *BGE*] cases, where formal rulemaking was not required." *Id*. In sum, an action by an agency that does not "formulate new rules of widespread application, change existing law, or apply [rules] retroactively to the detriment of an entity that had relied on the agency's past pronouncements" is not a regulation. *Id.* at 601 (quotation marks and citation omitted).

We also find *Medical Management & Rehabilitation Services, Inc. v. Maryland Department of Health & Mental Hygiene*, 225 Md. App. 352, 364 (2015) ("*MMARS*") instructive. In that case, plaintiffs sued the Maryland Department of Health and Mental Hygiene's (the "Department") award of a case management contract to The Coordinating Center. The circuit court granted the Department's motion to dismiss for failure to state a claim, and we affirmed. We reviewed *HMO* and other cases and stated that we were:

> not persuaded that the Department, through the [Request for Proposals ("RFP")], formulated new rules of widespread application, changed existing law, or applied rules retroactively to MMARS's detriment. To be sure, the competitive bid procedure for procurement contracts that was followed for previous RFPs under the [Rare and Expensive Case Management] program no longer applied. But, that change in the procedure was in accordance with statute and implementing regulations adopted in accordance with the rulemaking provisions of the APA.

MMARS, 225 Md. App. at 368. Accordingly, we determined that the circuit court's grant of the motion to dismiss was legally correct.

B. Concussions

Effective July 1, 2011, the Maryland General Assembly enacted legislation, titled "Concussion policy and awareness" that tasked the State Board of Education ("State Board") to "develop policies and implement" a statewide program for elementary and secondary public schools to provide concussion awareness for "**coaches**, school personnel, students, and the parents or guardians of students[.]" Md. Code Ann., Education ("Ed."), § 7-433(b)(1) (emphasis added). *See also* Code of Maryland Regulations ("COMAR") 13A.06.08.01 (implementing § 7-433 "to establish a program of concussion awareness and prevention throughout the State of Maryland for student-athletes, their parents or guardians, and their **coaches**" (emphasis added)). The statute further directs the State Board to establish a program that "shall include a process to verify that **a coach** has received information on the program developed" and, before a public school student "may participate in an authorized interscholastic athletic activity, the county board shall provide a concussion and head injury information sheet to the student and a parent or guardian of the student." Ed. § 7-433(b)(2), (3)(i) (emphasis added). As to concussions, the statute

provides that a student "who is suspected of sustaining a concussion or other head injury in a practice or game shall be removed from play at that time" and "may not return to play until the student has obtained written clearance from a licensed health care provider trained in the evaluation and management of concussions." Ed. § 7-433(c). Noteworthy, nowhere does the statute mention referees or sports officials.

The State Board in response adopted regulations to implement the statute. Specifically, the State Board instructed that each local school board "shall train **each coach** in concussion risk and management[,]" and the training shall include, at a minimum: the nature of the risk of a brain injury, the risk of not reporting a brain injury, criteria for removal and return to play, understanding concussions, recognizing concussions, and signs and symptoms, and their response and action plan. COMAR 13A.06.08.04A (emphasis added). Additionally, each school system "shall require a certificate of completion from a **coaches'** training course with refresher training every 2 years as a condition of **coaching** employment." COMAR 13A.06.08.04B (emphasis added). Again, nowhere in the COMAR concussion regulations are referees or sports officials mentioned.

The State Board also developed, as directed by the General Assembly, a concussion program by collaborating "with the Maryland Department of Health, each county['s] board[s of education], the [Association], the Maryland Athletic Trainers' Association, the Brain Injury Association of Maryland, and representatives of licensed health care providers who treat concussions[.]" Ed. § 7-433(b)(1). The result of this collaboration was a document titled, "Policies and Programs on Concussions for Public Schools and Youth Sport Programs" (Maryland State Department of Education, updated through December

2012) (the "Policy Document"). *See also* COMAR 13A.06.08.03 (incorporating the Policy Document by reference). The Policy Document is a valid regulation, and neither party has alleged any deficiencies in its adoption.

The Policy Document recognizes that the "student, parent, and school staff [are] integral partners" in the management of concussions and sets out the roles and responsibilities for the management of students with suspected concussions. The Policy Document provides a chart of those possibly involved when a concussion occurs and their responsibilities, including the: student, parent/guardian, school administrator, private medical provider, school nurse, school counselor, school teachers, school psychologist, speech-language pathologist, athletic director, certified athletic trainer, physical education teacher, and **coaches**. As to who initiates removal of the student athlete during practice or games, the Policy Document specifically states that the **coach** has the responsibility to "remove an athlete if a . . . concussion is suspected." Therefore, in Maryland, only coaches have the express responsibility for concussion removal during practice or games.

For the 2022-2023 year, the volleyball Clinic included a PowerPoint slide that contained information about Maryland law as to concussion protocols. The pertinent slide states:

> **Concussion Protocols:**
>
> * Any athlete who exhibits signs, symptoms, or behaviors consistent with a concussion (such as loss of consciousness, headache, dizziness, confusion, or balance problems) shall be immediately removed from the contest and shall not return until cleared by an appropriate health-care professional.
>
> * <u>It is not the responsibility of an official to assess a potential concussion.</u>

> * It is appropriate for an official to suggest to a coach to attend to a player exhibiting the above signs, refraining from assessing that you think the player has a concussion.

(Emphasis added.)

Since 2012, Maryland regulation, through adoption of the Policy Document, specifically assigns to coaches the responsibility, during practice and contests, to remove an athlete if a concussion is suspected. To carry out this responsibility, coaches receive mandated training in concussion risk and management. Sports officials are not part of the statutory or regulatory framework. Therefore, the PowerPoint slide statement that coaches have the responsibility to remove a player suspected of having a concussion from play is not a new rule, change of existing law, or retroactive application to the detriment of referees.

In appellant's complaint, he simply alleged that the PowerPoint slide was binding regulation, and because the Association did not follow the APA, the promulgated regulation is illegal. Nowhere in this complaint did he allege that the PowerPoint slide created a new rule of widespread application, changed existing law, or applied retroactively to the detriment of an entity that had relied on the Association's past pronouncements. Moreover, he never raised this argument at the motion hearing where he focused only on the Association's res judicata argument, the Association's reply motions, and his first amendment argument.

In his appellate brief, however, appellant argues that the PowerPoint slide formulated "new rule[s] of widespread application and change[d] existing law[,]" and he directs our attention to the National Federation of State High School Associations

("NFHS"). Appellant argues that "[i]n the past the [Association] adopted NFHS rules and rulebooks to govern athletic contests that instructed **referees** to remove the player if they 'exhibit signs, symptoms or behaviors consistent with a concussion.'" (Emphasis added.) He then cites to three exhibits that he attached to his complaint. The first exhibit is a 2022 email from appellant to, among others, Ed Tucholski, an Association Rules Interpreter for volleyball; the second exhibit consists of fourteen pages of the "2023-24 NFHS Volleyball Rules" and suggested guidelines for management of concussions; and the third exhibit is the 2021-2022 NFHS Volleyball case book.

None of appellant's exhibits state that a referee is tasked with removing a player with a suspected concussion. More importantly, appellant has presented no explanation or argument (below or on appeal) as to how the NFHS is relevant to Maryland – there is no argument that Maryland has ever adopted the NFHS rules or why the NFHS rules would prevail over Maryland law. Other than repeatedly stating that the slide is a "new rule" and a regulation in his appellate brief, appellant has failed to explain how the slide is a new rule. Moreover, he cannot cogently do so, as the PowerPoint slide is an accurate reflection of existing Maryland law and regulation.

C. Hair adornments

In 2020, the Maryland General Assembly provided additional protections against discrimination in Maryland by amending the definition of "race" to include "traits associated with race, including hair texture, afro hairstyles, and protective hairstyles." SG § 20-101(h). The term "protective hairstyle" was added and defined to include "braids, twists, and locks." SG § 20-101(g).

In response to this new law, the Association changed Unit I of the 2022-2023 and 2023-2024 Clinic. They now contain a "DO" and a "DON'T" slide for hair adornments. The DO slide contains the following statements:

DO

> -Head officials prior to the contest shall request verbal verification from the head coach that their students are properly equipped to compete.
>
> -Officials are only required to ensure, as it relates to student hairstyles and hair adornments, that the head coach of each team has authorized that all participants on their respective teams are properly equipped.
>
> -Officials, if requested for rule interpretation on hair adornments, shall refer the coach to the applicable rule for the head coach's discretion.
>
> -After the contest, the official may contact their local association, who will notify the local school system, only if they believe a student's hair adornment potentially poses a risk of injury to the athlete or others.

The DON'T slide contains the following statements:

DON'T

> -Officials shall not address any student directly related to their concerns on uniform compliance.
>
> -Officials shall not make determinations or comments about whether or not a hair adornment shall be removed or whether or not a student may participate with such hair adornment.
>
> -Officials may not touch any student's hair to check hair adornments(s).
>
> -Officials may not remove a hair adornment from the student's hair.

The 2022-2023 volleyball Clinic included a PowerPoint slide that contained the following information about Maryland law regarding hair adornments:

> In order to ensure compliance with state laws, high school sport officials should not determine participation related to a students' hairstyle and adornments. Officials are only requested to receive verbal verification from

> the head coach that their students are properly equipped to compete. It is the Coaches Responsibility to ensure all students comply with uniform and equipment regulations per Maryland State Law and the playing rules for the contest.

(Emphasis in original.)

We reject appellant's regulation argument as to hair adornments. As with his concussion argument, nowhere in appellant's complaint nor in his argument before the circuit court did he allege that the PowerPoint slide created a new rule of widespread application as to hair adornments, changed existing law, or applied retroactively to the detriment of an entity that had relied on the Association's past pronouncements. In his appellate brief, appellant argues that, in response to the new legislation on hair adornments, the Association "formulated new rules of widespread application and changed existing law." However, he admits that there were "no statutory standards in the first place." He points to the NFHS rules on hair adornments and argues that "there is legitimate ambiguity as to how the term 'hair adornments' intersects with [Maryland's] new hairstyle and hair discrimination law." He then concludes that the PowerPoint slide "is clearly a new rule of widespread application and a change in existing law and not an evolution of existing statutory standards."

We agree with the Association that it was "not required to proceed by formal rulemaking because it did not 'formulate rules of widespread application.'" (Quoting *Consumer Publ'g*, 304 Md. at 756.) Rather, it granted accommodations for hair adornments through an individual analysis conducted by local school systems, in light of the amended nondiscrimination statute. In sum, like the reasoning in *MMARS, supra*, we find no error

by the circuit court in dismissing the complaint as to concussions and hair adornments because appellant has failed to state a claim upon which relief could be granted.[3]

II.

Appellant argues that the circuit court erred in dismissing his free speech claim. Appellant argues that the PowerPoint slides specifically instruct referees to not warn coaches of a concussion of a student athlete, and in the case of unsafe hair adornments that could cause harm, to submit concerns only after the practice/contest. He further argues that the slides "chill[]" his right to free speech.

Here, the PowerPoint slide advises sports officials to "refrain[] from assessing that you think the player has a concussion[,]" which they are not medically qualified to do, but provides that an official may suggest to a coach to attend to a player who exhibits suspicious signs of a concussion. As to hair adornments, the PowerPoint slide advises that it is the coaches' responsibility "to ensure all students comply with uniform and equipment regulations per Maryland State Law and the playing rules for the contest[,]" and that sports officials are to "not determine participation related to a students' hairstyle and adornments.

[3] To the extent that appellant argues that we should rule that sports officials owe a duty of care to student athletes, whether in the context of a concussion or hair adornment safety, we reject that argument. The Association argues that we must dismiss appellant's argument on this point because his complaint does not allege any "tort" violation, and therefore, what appellant is actually seeking is an "advisory opinion" based on hypothetical and abstract facts without an existing controversy. *See Polakoff v. Hampton*, 148 Md. App. 13, 39 (2002) (stating that, as a matter of law, the circuit court was required to dismiss claims based on "hypothetical, abstract, and necessarily incomplete facts" because there was no existing case or controversy, and this was an improper and impermissible use of the declaratory judgment process). We agree. Therefore, we shall dismiss this argument.

Officials are only requested to receive verbal verification from the head coach that their students are properly equipped to compete."

We agree with the Association that the circuit court did not err because the Association's slide in no way restricts appellant's free speech rights and communicate his belief that a player may have a concussion. Moreover, as the Association points out, when speaking pursuant to their duties as sports officials, rather than as citizens, their speech is subject to at least a modicum of control. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (acknowledging that while neither teachers or students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]" neither can public school employees "deliver any message to anyone anytime they wish[,]" for as government employees, they are paid, in part, to speak on the government's behalf and convey its messages (quotation marks and citation omitted)). *See also Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016) (If a teacher "is not wearing her hat 'as a citizen,' or if she is not speaking 'on a matter of public concern,' then the First Amendment does not protect her."). Further, the United States Supreme Court has said that where the speech at issue is pursuant to his/her duties, the First Amendment "generally will not shield the individual from an employer's control and discipline[.]" *Kennedy*, 597 U.S. at 527. Appellant has not alleged in his complaint that the speech he wants to engage in regarding concussions (or hair adornments) as a sports official during a practice or game is within his First Amendment right as a sports official. Accordingly, we find no merit to this argument.

III.

Lastly, appellant argues that the circuit court erred in dismissing his complaint for failure to state a claim because the Association failed to properly make that argument in its reply motion in contravention of Md. Rule 2-311(c). The Association responds that it properly raised failure to state a claim in its reply motion to appellant's complaint and, even if it did not, it did so in its subsequent motion, which did not prejudice appellant.

Four days after the circuit court dismissed appellant's first complaint, he filed a second complaint. The Association in turn filed a reply motion titled, "MPSSAA's Motion to Dismiss on Res Judicata Grounds" and an accompanying "Memorandum In Support of MPSSAA's Motion to Dismiss on Res Judicata Grounds." In its motion and memorandum, the Association stated, among other things, that it "incorporates by reference all its prior pleadings in Case No. C-13-CV-23-000601" and then it separately addressed res judicata and appellant's free speech claim.

The following day, appellant filed a reply motion addressing the res judicata argument. Near the end of the motion, appellant asserted that any argument by the Association about whether he made material modifications to his complaint are not relevant in the "context of a *res judicata* dismissal motion . . . [but would be] appropriate in a subsequent motion to dismiss for failure to state a claim[.]" A week later, the Association filed "MPSSAA's Reply to Plaintiff's Response," attaching prior pleadings that the Association had incorporated by reference in its motion to dismiss but had not previously attached. In this motion, the Association stated that appellant "mischaracterizes" its pending motion to dismiss as "solely focused on the issue of *res judicata*," clarifying that:

> [f]or efficiency, the pending Motion to Dismiss incorporated by reference all the [Association's] pleadings in Case No.: C-13-CV-23-000601, such that all the arguments raised therein are before this [c]ourt again. Simply put, the [Association] still seeks dismissal for failure to state a claim upon which relief can be granted.

(Cleaned up.) In a footnote, the Association stated: "The [Association] attaches those pleadings here as Exhibits A and B to make abundantly clear that they have been re-submitted in Case No. C-13-CV-23-000959 and serve as independent grounds for dismissal."[4]

A month and two days after the Association filed its reply to appellant's response, the court held a hearing on all the motions and issued a ruling from the bench. The next day, appellant filed a motion, captioned: "Plaintiff's Surreply to Defen[d]ant's Motion to Dismiss or in the Alternative Rule 2-342 Motion to Amend Record for Clarity[.]" In the motion, appellant stated that he wished to add exhibits from the previous case and to incorporate argument, as the Association had in its motion.

The Maryland Rules do not specifically address surreply motions, but they do address motions generally. Md. Rule 2-311(c), on motions and exhibits, provides:

> A written motion and a response to a motion shall state with particularity the grounds and the authorities in support of each ground. A party shall attach as an exhibit to a written motion or response any document that the party wishes the court to consider in ruling on the motion or response unless the document is adopted by reference as permitted by Rule 2-303(d) or set forth as permitted by Rule 2-432(b).

[4] Exhibit A was the Association's previous motion to dismiss for failure to state a claim. Exhibit B was the Association's memorandum in support of their motion to dismiss.

Md. Rule 2-303(d), on pleading forms and adoption by reference, provides that: "Statements in a pleading or other paper of record may be adopted by reference in a different part of the same pleading or paper of record or in another pleading or paper of record."[5]

Appellant argues that the Association failed to comply with Md. Rule 2-311(c) in its reply motion to his complaint because it "failed to state with any particularity the manner in which the prior arguments were being incorporated and failed to state any authority to support the prior arguments in the motion[.]" Appellant admits that the Association properly included their previous argument in their subsequent motion, but appellant argues that he was harmed by the Association proceeding in this manner because the Association was able to alter/add grounds for dismissal to which he could not respond.

The Maryland Rules are to be interpreted "to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." Md. Rule 1-201(a). Moreover, "[w]hen a rule, by the word 'shall' or otherwise, mandates or prohibits conduct, the consequences of noncompliance are those prescribed by these rules[,]" and where "no consequences are prescribed, the court may compel compliance with the rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule." *Id.*

Our reading of the relevant pleadings shows that the Association incorporated its prior pleadings by reference in its reply motion. *Cf. Miller v. Mathias*, 428 Md. 419, 442

[5] Md. Rule 2-432(b) is not relevant to this discussion as it governs motions for failing to provide discovery.

n.15 (2012) (stating that under Maryland law, it is the substance of the pleading that governs its outcome not its label, form, or caption). Realizing that this might not be clear that it was arguing that appellant's complaint should be dismissed because it failed to state a claim, in addition to res judicata, the Association clarified its position in a subsequent motion filed more than a month before the merits hearing, and yet appellant chose not to file a reply until the day after the hearing.

More than a month before the hearing, the Association moved to dismiss appellant's second complaint on three grounds and filed a subsequent motion clarifying the three grounds for dismissal: failure to state a claim, res judicata, and failure to allege sufficient facts to support appellant's first amendment claim. Appellant chose not to file a reply to this response until after the hearing. Even if the Association's motion amounted to a technical error in relating its argument, we shall not reverse except for prejudice, which appellant has failed to show. *Cf. Barksdale v. Wilkowsky*, 419 Md. 649, 660 (2011) ("[T]he burden to show error in civil cases is on the appealing party to show that an error caused prejudice."). Accordingly, we find no error by the circuit court in dismissing appellant's second complaint with prejudice.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.