STATE OF MICHIGAN

COURT OF CLAIMS

DOUGLAS WILLER and MARY F. WILLER,

Plaintiffs,

v

JAMES WEBB, et al,

Defendants.
_____/

OPINION AND ORDER

Case No. 18-000114-MB

Hon. Stephen L. Borrello

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). For the reasons stated below, the motion is GRANTED.

I. BACKGROUND

This case has its origins in the decision by Eastern Michigan University to eliminate four varsity sports programs—men's wrestling and swimming and diving, as well as women's softball and tennis. According to the allegations in plaintiffs' complaint, defendant Scott Weatherbee,[1] who is the Vice President and Director of Athletics at EMU, announced the planned cuts in March 2018. The complaint, while purporting to quote from Weatherbee's comments at a press conference, notes that Weatherbee "went to the Board," i.e., defendant EMU Board of Regents, that he "notified" the Board, and that the "Board and the President" of

[1] The Court notes that defendant's briefing utilizes the spelling "Wetherbee." Because the summons and complaint utilizes "Weatherbee," this opinion will do the same, for the sake of consistency.

EMU had wanted to wait to announce the planned cuts "until graduation[.]" Defendant Board of Regents, through defendant James Webb, the Board president, announced that the Board "fully support[ed]" defendant Weatherbee and defendant James Smith, the EMU president. In its responsive briefing, plaintiffs contend that these allegations "imply" that the Board of Regents held secretive meetings discussing the decision to eliminate the four varsity sports.

Plaintiffs' complaint alleges that these purported Board meetings violated the Open Meetings Act (OMA), MCL 15.261 *et seq.* The complaint is styled as one seeking mandamus relief. Count I of the complaint alleges that "[t]his meeting" was conducted in secret, without prior notice to the public, and that such a meeting "constitutes a deliberate violation" of the OMA. Plaintiffs ask this Court to invalidate the Board's action of eliminating the four varsity sports and to award statutory damages and attorney fees available under the OMA.

Count II of plaintiffs' complaint refers to a particular Board meeting, held on or about April 20, 2018. This meeting was open to the public. Plaintiffs note that MCL 15.263(5) of the OMA provides that a person "shall be permitted to address a meeting of a public body under rules established and recorded by the public body" at a public meeting. Plaintiffs allege that defendants violated this section of the OMA with respect to the April 20, 2018 meeting. In particular, plaintiffs allege that the Board, acting in reliance on its own rules, limited public comment to only 30 minutes, and to a total of 10 speakers. Plaintiffs, despite signing up two days in advance of the meeting, were not among the first 10 speakers and they were not allowed to speak at the meeting. Nor, alleges the complaint, were any individuals who wished to discuss the decision to cut the four varsity sports. According to plaintiffs, limiting public participation in this manner violated MCL 15.263(5). Plaintiffs once again ask this Court to invalidate the action of eliminating the four varsity sports and to award statutory damages and attorney fees. In

addition, plaintiffs ask the Court to enjoin defendants from enforcing its 30-minute-public-comment rule at future Board meetings.

II. ANALYSIS

Defendants move this Court for summary disposition under MCR 2.116(C)(8). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and summary disposition is appropriate "if the opposing party has failed to state a claim on which relief can be granted." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010) (citations, quotation marks, and alteration omitted). "When deciding a motion under (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party." *Id.* at 304-305. "Summary disposition on the basis of subrule (C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* at 305 (citation and quotation marks omitted).

At the outset, it must be noted that the parties' briefing has raised the issue of whether this Court has jurisdiction over plaintiff's purported mandamus action. MCL 15.271(2) provides that, under the OMA, an "action for mandamus against a public body[2] . . . *shall be commenced in the court of appeals*." (Emphasis added). The Court need not decide whether a complaint seeking a writ of mandamus under the OMA can be heard in this Court, however, because a careful review of the pleadings reveals that plaintiffs have not actually pled an action for mandamus relief. Indeed, "whether the Court of Claims possesses jurisdiction is governed by the

[2] The EMU Board of Regents meets the definition of a "public body" under the OMA. See MCL 15.262(a).

actual nature of the claim, not how the parties phrase the request for relief or the characterization of the nature of the relief." *AFSCME Council 25 v State Employees' Retirement Sys*, 294 Mich App 1, 6; 818 NW2d 337 (2011). See also *Reynolds v Robert Hasbany MD PLLC*, __ Mich App __, __; __ NW2d __ (2018) (Docket No. 336933), slip op at 3 (explaining that subject-matter jurisdiction is determined by reference to the allegations in the complaint). Mandamus is an extraordinary remedy that will issue to compel a defendant to take certain action. *Attorney General v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016). Here, a review of the complaint reveals that plaintiffs are not asking this Court to compel defendants to take action; rather, the complaint asks this Court to declare that all or some of the defendants violated the OMA. And, as a result of these purported OMA violations, plaintiffs ask this Court to declare, under the OMA, that the resulting actions were invalid. Plaintiffs also seek to enjoin defendants from employing a 30-minute limitation on public comment at meetings in the future. Finally, plaintiffs seek statutory damages and attorney fees under the OMA. None of these requests can be described as an action for mandamus, i.e., an action to compel any of the defendants to take a particular action. Moreover, these allegations, made against defendants that can all be described as "the state or any of its departments or officers," see MCL 600.6419(7), fall within this Court's subject matter-jurisdiction, see MCL 600.6419(1)(a). Thus, on the allegations pled, this Court has subject-matter jurisdiction, regardless of whether a complaint seeking mandamus relief under the OMA can only be heard in the Court of Appeals.[3]

[3] As a result, this Court need not decide, and is not deciding, whether an action for mandamus against a public body under the OMA can be heard in this Court, or whether the Court of Appeals has exclusive jurisdiction over such a claim.

Turning to the arguments raised in defendants' motion for summary disposition, the Court must begin by considering the unique authority granted to universities and their governing boards under the Michigan Constitution. Notably, Const 1963, art 8, §§ 5-6 "confer[ ] unique constitutional status on our public universities and their governing boards." *Federated Publications, Inc v Mich State Univ Bd of Trustees*, 460 Mich 75, 84; 594 NW2d 491 (1999). With respect to EMU,[4] Const 1963, art 8, § 6 provides, in pertinent part, that the University:

> shall [ ] be governed by a board of control which shall be a body corporate. The board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds.

The grant of authority occasioned by this constitutional provision is broad, with caselaw declaring that a university's board is given "exclusive authority over the management and control of its institution[.]" *Wade v Univ of Mich*, 320 Mich App 1, 16; 905 NW2d 439 (2017). See also *Federated Publications*, 460 Mich at 86-87 (recognizing that Const 1963, art 8, § 5—which contains similar provisions to art 8, § 6—acts as a "limit [on] the Legislature's power" with respect to a public university). In addition, caselaw has recognized that the constitutional status conferred upon a university's governing board is "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." *Federated Publications*, 460 Mich at 84 n 8 (citation and quotation marks omitted). To that end, the "Legislature may not interfere with the management and control of universities." *Id.* at 87 (citation and quotation

[4] Const 1963, art 8, § 5 applies to three universities—Michigan State University, the University of Michigan, and Wayne State University—and grants certain authority to the universities and their respective boards. Const 1963, art 8, § 6 grants nearly identical authority to the boards of other state universities, including the EMU Board of Regents.

marks omitted). However, the broad authority conferred upon a university board is restricted, to an extent, by Const 1963, art 8, § 4, which provides that "[f]ormal sessions of governing boards of such institutions shall be open to the public." See also *Federated Publications*, 460 Mich at 84 (discussing the same).

Given the unique character of the EMU Board of Regents "and its exclusive authority over the management and control of its institution," the first issue the Court must consider is "whether the conduct being regulated," i.e., the manner in which the EMU Board of Regents conducts its meetings, "is within the exclusive power of the University or whether it is properly the province of the Legislature." *Wade*, 320 Mich App at 16. As was explained by the Court of Appeals in *Wade*, "matters outside the confines of the University's exclusive authority to manage and control its property are the province of the Legislature, and the University may be affected thereby." *Id.* at 17. See also *Federated Publications*, 460 Mich at 87 (recognizing that universities are not exempt from all regulation). However, "matters involving the University's management and control of its institution or property are within the Board of Regents' exclusive authority, and the Legislature may not interfere; the Legislature's promulgated laws must yield to the University's authority." *Wade*, 320 Mich App at 16-17. It is within this realm that the University remains "supreme." *Federated Publications*, 460 Mich at 87 (citation and quotation marks omitted).

As it concerns areas into which the Legislature may not interfere and laws that must yield to the University's authority, this state's appellate courts have discussed the applicability, or lack thereof, of the OMA to university boards. In *Federated Publications*, 460 Mich at 88, the Supreme Court described the OMA as "a law that dictates the manner in which the university operates on a day-to-day basis." It also held that application of the OMA to—as was at issue in

that case—"internal operations of the university in selecting a president infringes on defendant's constitutional power to supervise the institution." *Id.* at 88. The Court explained that "[g]iven the constitutional authority to supervise the institution generally, *application of the OMA to the governing boards of our public universities is [ ] beyond the realm of legislative authority*." *Id.* at 89 (emphasis added). Stated otherwise, "the Legislature does not have power to regulate open meetings for defendant in the context of presidential searches at all, i.e., the Legislature is institutionally unable to craft an open meetings act that would not, in the context of a presidential selection committee, unconstitutionally infringe the governing board's power to supervise the institution." *Id.* at 78.

The Supreme Court explained that its decision—that the OMA could not constitutionally be applied to the university in that case—was further supported by Const 1963, art 8, § 4. In this respect, "[t]he delegates to the Constitutional Convention of 1961 recognized that the decision whether to open meetings of university governing boards to the public lay within the boards' sphere of authority." *Id.* at 89-90 (citation omitted). This authority was restricted *only* by art 8, § 4, which required a university board to open "formal sessions" of the board to the public. *Id.* at 90. As the *Federated Publications* Court explained:

> That the provision is limited to "formal sessions," rather than all sessions, signifies that the governing boards retain their power to decide whether to hold "informal" sessions in public. Const 1963, art 8, § 5, prohibits the Legislature from intruding in this basic day-to-day exercise of the boards' constitutional power. *Nor can application of the OMA rest on the absence of a definition of "formal sessions" in the constitution. Unlike other provisions of the constitution, the Legislature is not delegated the task of defining the phrase "formal sessions" for purposes of Const 1963, art 8, § 4.* [*Id.* (emphasis added).]

In *Detroit Free Press Inc v Univ of Mich Regents*, 315 Mich App 294, 298; 889 NW2d 717 (2016), the Court of Appeals recently explained that the holding in *Federated Publications*

was not limited to a university board's utilization of a special committee to search for a replacement president. Instead, explained the Court of Appeals, *Federated Publications* can be understood, in general, as defining the "scope of the Legislature's power to regulate public universities." *Id.* (citation and quotation marks omitted). In *Detroit Free Press*, the Court of Appeals recognized that "[t]he Constitution permits defendant to hold informal meetings in private; defendant is only required to hold its formal meetings in public." *Id.* at 299. The Court noted that a university board was not given "unfettered discretion" with respect to public meetings, because "a governing board's determination of what constitutes formal and informal is not *wholly* insulated from judicial review." *Id.*, citing *Federated Publications*, 460 Mich at 91 n 14. In the referenced footnote, i.e., footnote 14 of *Federated Publications*, the Supreme Court explained that in determining what constitutes a "formal" meeting that must be open to the public under art 8, § 4, and an "informal" meeting that lies wholly within the board's authority, it was appropriate to "apply the most deferential standard when reviewing the board's definition of 'formal session,' limited to determining whether it bears any relation to the purpose of Const 1963, art 8, § 4." *Federated Publications*, 460 Mich at 91 n 14.

Turning to the instant case, the Court concludes that the holdings of *Federated Publications* and *Detroit Free Press* control the outcome of the issues presented by plaintiffs' complaint. In order to find that plaintiffs can prevail on either of their claims, the OMA would, contrary to the holding in *Federated Publications*, 460 Mich at 88, "dictate[ ] the manner in which the university operates on a day-to-day basis." This cannot be so. As was the case in *Federated Publications* and *Detroit Free Press*, application of the OMA to meetings concerning EMU's decision to terminate four varsity sports in this case would "infringe[ ] on [defendants'] constitutional power to supervise the institution." *Id.* at 88. See also *id.* at 79 (explaining that

the "Legislature does not have power to regulate open meetings for [a university board] . . . at all, i.e., *the Legislature is institutionally unable to craft an open meetings act that would not . . . infringe the governing board's power to supervise the institution*") (emphasis added); *Detroit Free Press*, 315 Mich App at 298-299. As explained by the Supreme Court in *Federated Publications*, 460 Mich at 89, "[g]iven the constitutional authority to supervise the institution generally, application of the OMA to the governing boards of our public universities is [ ] beyond the realm of legislative authority."

This conclusion is unchanged by plaintiffs' assertions about the limitations placed on public comment by the Board at the April 20, 2018 meeting.[5] As noted by the Supreme Court in *Federated Publications*, the opening of "formal" meetings to the public under Const 1963, art 8, § 4 does *not* bring about operation of the OMA to such meetings. See *Federated Publications*, 460 Mich at 90 (explaining that "application of the OMA" does not rest "on the absence of a definition of 'formal sessions' in the constitution."). Hence, plaintiff's citation to an Attorney General Opinion regarding the length of public comment periods in unrelated, i.e., non-university matters, is unconvincing.

Plaintiffs' assertion regarding the (limited) availability of judicial review to a Board's decision whether to hold a "formal" or "informal" meeting does not change the equation either. Any judicial review permitted by *Federated Publications* is expressly limited to "the most deferential standard," i.e., determining whether the "board's definition of 'formal sessions' . . . bears any relation to the purpose of Const 1963, art 8, § 4." *Id.* at 91 n 14. It is not, as plaintiffs

[5] The Court notes that plaintiffs have not alleged that any of the board's regular, formal meetings were entirely closed to the public.

imply, a review of whether a formal meeting satisfied the requirements of the OMA. Furthermore, plaintiffs have not identified, nor made any arguments with respect to, the EMU Board of Regents' definition of 'formal sessions." Nor have plaintiffs argued whether this definition "bears any relation to the purpose of Const 1963, art 8, § 4." And where plaintiffs have not made these arguments, the Court will not make the arguments on plaintiffs' behalf. Plaintiffs' mere assertion regarding the availability of the limited manner of judicial review noted by *Federated Publications* and *Detroit Free Press* is unconvincing.[6]

III. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(8).

This order resolves the last pending claim and closes the case.

Dated: August 30, 2018

Stephen L. Borrello, Judge
Court of Claims

[6] Moreover, even assuming that the OMA applied and assuming that defendants violated the act in any respect, the Court would not invalidate the action taken by the EMU Board of Regents in this case. The OMA gives the Court discretion whether to invalidate an action that fails to comply with the act. MCL 15.270(2); *Lockwood v Ellington Twp*, __ Mich App __, __; __ NW2d __ (2018) (Docket No. 338745), slip op at 6. On the allegations made in plaintiffs' complaint, the decision to eliminate the four varsity sports, even if made in a secret meeting and in a manner that was contrary to the OMA, was re-approved at a public meeting in April 2018. Were this Court to address the issue, it would find that this re-enactment serves as another reason to decline to invalidate the Board's action. See *Lockwood*, __ Mich App at __, slip op at 7 (discussing the manner in which a public body can "cure" an OMA violation such that invalidation is not warranted). See also MCL 15.270(5).