

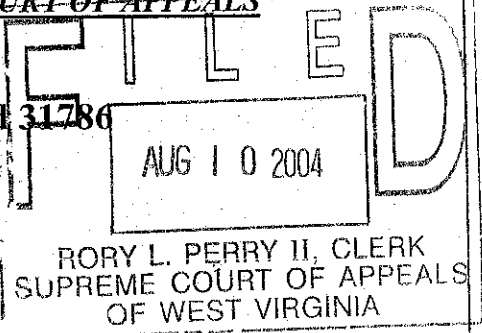
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
Charleston

Appeal Nos. 31785 and 31786

DANIEL JONES and CHRISTIE JONES,
Plaintiffs Below, Appellees

v.

No. 31785



**WEST VIRGINIA STATE BOARD OF EDUCATION;
STATE SUPERINTENDENT DAVID STEWART;
MARION COUNTY BOARD OF EDUCATION;
MARION COUNTY SUPERINTENDENT THOMAS LONG; and
WEST VIRGINIA SECONDARY SCHOOLS ACTIVITIES
COMMISSION,**

Defendants Below

**WEST VIRGINIA STATE BOARD OF EDUCATION and
STATE SUPERINTENDENT DAVID STEWART,
Appellants**

and

DANIEL JONES and CHRISTIE JONES,
Plaintiffs Below, Appellees

v.

No. 31786

**WEST VIRGINIA STATE BOARD OF EDUCATION;
STATE SUPERINTENDENT DAVID STEWART;
MARION COUNTY BOARD OF EDUCATION;
MARION COUNTY SUPERINTENDENT THOMAS
LONG; and WEST VIRGINIA SECONDARY SCHOOLS
ACTIVITIES COMMISSION,**

Defendants Below

**WEST VIRGINIA SECONDARY SCHOOLS ACITVITIES
COMMISSION,**

Appellant

BRIEF OF AMICUS CURIAE
WEST VIRGINIA EDUCATION
ASSOCIATION

INTRODUCTION

The WVEA will address specific legal issues presented by the case. The WVEA will not address all legal issues set forth in the case but will focus on matters of particular interest to its members. We ask the Court to keep in mind that we generally support the position of the WVSSAC in this case and where specific legal issues are not addressed herein we adopt the arguments made by the WVSSAC.

BRIEF STATEMENT OF FACT

There is very little dispute regarding the facts in this case. They are fully explored by the parties. The WVEA will, therefore, provide only a brief summary of the facts and procedural history of this matter herein and leave the full statement to the parties.

In September 2002, the parents of Aaron Jones sought permission from Mike Hayden, Executive Secretary to the West Virginia Secondary Schools Activities Commission (WVSSAC), for their son to compete on the wrestling team at Mannington Middle School. At that time, Aaron was eleven years old and was not enrolled at Mannington Middle School but was receiving academic instruction at home pursuant to *West Virginia Code* §18-8-1(c)(3). This provision provides a “home schooling” exemption to the mandatory public school attendance statute.

On behalf of the WVSSAC, Mr. Hayden informed the Jones' that their son was ineligible to participate in public interscholastic sports pursuant to WVSSAC Rule §127-2-3.1 which states:

To be eligible for participation in interscholastic athletics, a student must be enrolled full-time in a member school as described in Rule 127-2-6 on or before the eleventh instructional day of the school year. Enrollment must be continuous after the student has officially enrolled in school.

In short, students who are "home schooled" may not participate on West Virginia public school athletic teams.

Mr. and Mrs. Jones filed suit seeking injunctive relief to obtain access to participation in the Mannington Middle School wrestling program for their son. A bench trial was conducted in the Circuit Court of Kanawha County on February 13, 2003. Judge Bloom issued a Decision and Final Order in favor of the Plaintiffs on September 23, 2003. One of the stated reasons for the WVSSAC rule is that it promotes academics over athletics by requiring students to maintain a "C" average (2 on the 4 point grade scale) in public school academics to participate in athletics. The assessment systems available for students in home school settings are so disparate from those used in public school that it is not feasible to hold those students to the same academic standards required of public school participation. On this issue the Circuit Judge ruled:

23. Prioritizing academics over extracurricular sports is a legitimate State goal. However, the magnitude of the defendants' response to the perceived inequities in the measurement of academic eligibility between public school students and home schooled students is excessive. This Court cannot conclude that the legitimate goal of prioritizing academics provides a rational basis

for the total exclusion of home schooled students from interscholastic sports that results from WVSSAC Rule 127-2-3.1.

Your Amicus Curiae, the WVEA, asserts that the Circuit Court erred in this ruling on the critical issue of prioritizing academic excellence over athletic participation and will address that issue herein.

ISSUE

WHETHER PROMOTING ACADEMIC ACHIEVEMENT OVER ATHLETIC PARTICIPATION PROVIDES A RATIONAL BASIS FOR PROHBITING STUDENTS NOT ENROLLED IN PUBLIC SCHOOLS FROM PARTICIPATING IN PUBLIC INTERSCHOLASTIC SPORTS.

ARGUMENT

PROMOTING ACADEMIC ACHIEVEMENT OVER ATHLETIC PARTICIPATION PROVIDES A RATIONAL BASIS FOR PROHBITING STUDENTS NOT ENROLLED IN PUBLIC SCHOOLS FROM PARTICIPATING IN PUBLIC INTERSCHOLASTIC SPORTS.

The West Virginia Legislature and the State Board of Education are charged with creating and supervising a free, thorough and efficient system of public education. *West Virginia Constitution Art. 12 §§1 and 2.* These entities, and those created or supervised by them, have a constitutional imperative to support high quality academic instruction in all West Virginia schools.

In fact, providing a high quality public education is the first constitutional priority among the State's mandated public services. *West Virginia Education*

Association v. Legislature of the State of West Virginia, 369 S.E.2d 454, 179 W.Va. 381 (1988).

On the other hand, this Court has held that “participation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right under Article XII §1 of the West Virginia Constitution”. *Bailey v. Truby*, 174 W.Va. 8, 321 S.E.2d 302 (1984). The WVSSAC rules promoting academic achievement over athletics are consistent with a constitutional imperative in West Virginia. The rules are not only good public policy on behalf of the governmental agency but they also carry out constitutional priorities.

The Circuit Court of Kanawha County is not the first West Virginia Circuit Court to address this issue. The question of a home schooled student participating in a public school athletic team was decided in Hampshire County in the case of *Gallery v. WVSSAC, et al.*, Civil Action No. 97-C-34 (June 9, 1998). Judge Cookman issued a well reasoned decision upholding WVSSAC Rule §127-2-3 because it is “rationally related to the legitimate governmental interests of: “1) providing a free public education to all residents of West Virginia; and 2) encouraging high academic standards from students by periodic monitoring of their educational progress and growth before they can participate in athletics.” *Id.* pages 9 and 10.

On the question of equal protection, Judge Cookman relied upon the West Virginia Supreme Court in *Janasiewicz v. Board of Education*, 171 W.Va. 423, 299 S.E.2d 34 (1982) in discussing whether the classes of public school pupils and home schooled pupils were similarly situated. In *Janasiewicz*, the Supreme Court held that

the equal protection clause of the Fourteenth Amendment was not violated by funding transportation for public and private school children differently. In holding that nonpublic school children need not be bussed by the public school system, the Court stated, "When there is a rational basis to distinguish between groups of individuals, not based on invidious discrimination, then different treatment does not offend equal protection provisions." *Janasiewicz*, page 37. The Court went on to say:

Public and parochial school children may rationally be treated differently because they are not similarly situated. All children under sixteen years old are required to attend approved schools; but a parochial school student has chosen to reject a free public school education in favor of a privately paid education emphasizing religious belief and principles.

Home school parents and students have also chosen to abandon the benefits of a free public education, often for similar reasons. As in all cases where persons raising equal protection arguments do not demonstrate that the rule or law restricts a fundamental right, the State must only show a rational basis for the rule for it to survive constitutional scrutiny. The Appellees do not seek the constitutional right of a free public education in this case. Rather, they seek only to participate in interscholastic athletics, a right which is neither fundamental nor constitutional. *Bailey v. Truby, supra*. The WVSSAC need only show a legitimate state interest for the rule to survive and equal protection challenge to their rule. They raise several, but only one of them will be addressed herein because of the particular interest of the WVEA members in it: The promotion of high academic standards.

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As was noted in *Bailey v. Truby*, the WVSSAC has a legally valid rule that requires students to achieve and maintain a 2.0 grade point average to participate in athletics. This rule serves the legitimate purpose of ensuring that students succeed academically first. This rule becomes even more important as federal funds for public schools become dependant upon student performance on standardized tests as a part of the Elementary and Secondary Act commonly referred to as "No Child Left Behind." Allowing students who are not enrolled in public schools to participate in interscholastic athletics is a virtual invitation for students who are struggling academically to utilize the home school exemption to circumvent the 2.0 grade point average rule.

Judge Bloom indicates that the WVSSAC could develop a system to hold home schooled students to a similar academic standard without totally excluding them from public school athletics. However, the legislature has established options for measurement of student progress for home schooled pupils that are vastly different from traditional public school measures. The provisions of *West Virginia Code* §18-8-1 makes it clear that there can be no legitimate comparison between grades in public schools and assessment of progress for home schooled students. First, unlike public schools where the instructors must be certified teachers who are graduates of accredited college teacher preparation programs, home school instructors need only be high school graduates or hold a GED. The expectations for achievement and assessment tools are very likely to be extremely different between the two groups. In fact, home schooled students need not take standardized tests or receive any grades at all to progress from one

educational level to the next. *West Virginia Code* §18-1-1(b)(4)ii states that it may be demonstrated that a student is making satisfactory progress without any tests or formal assessments at all in the following manner:

The county superintendent is provided with a written narrative indicating that a portfolio of samples of the child's work has been reviewed and that the child's academic progress for the year is in accordance with the child's abilities.

It is important to note that the progress is not compared to any national or state standard or scored in any way. The progress for the year need only be consistent with the "child's abilities". There is simply no way for this amorphous progress assessment to be equated to the 2.0 grade point average in the state established curriculum which is required of all public school students to participate in interscholastic sports competition.

The WVSSAC rule serves a very valuable and legitimate state interest. In West Virginia, educators have made a policy commitment that academics must come before sports. That commitment is formalized in the 2.0 grade point average rule lawfully adopted and maintained by the WVSSAC. This rule is enforced by Rule 127-2-3. The "C average" rule would be rendered meaningless if it could be easily circumvented through the home school exemption. The tragedy of course will be that more children would be left behind academically.

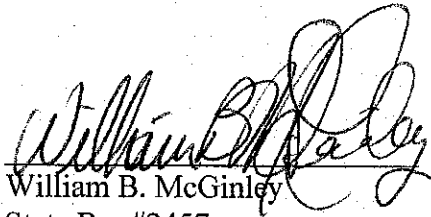
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CONCLUSION

Based upon the foregoing and all arguments set forth by the WVSSAC and the State Board of Education, the West Virginia Education Association respectfully urges this Court to reverse the ruling of the Circuit Court of Kanawha County.

Respectfully submitted,

West Virginia Education Association
By counsel



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CERTIFICATE OF SERVICE

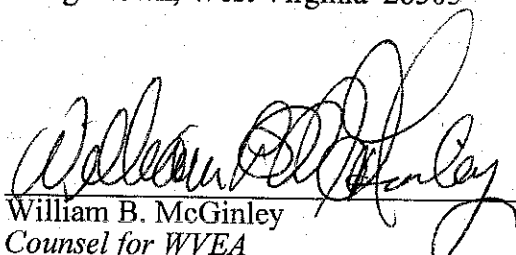
I, William B. McGinley, counsel for WVEA, hereby certify that I have served a true and exact copy of the foregoing *Brief of Amicus Curiae West Virginia Education Association* this the 9th day of August, 2004, by mailing same in a properly stamped and addressed envelope to the following:

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