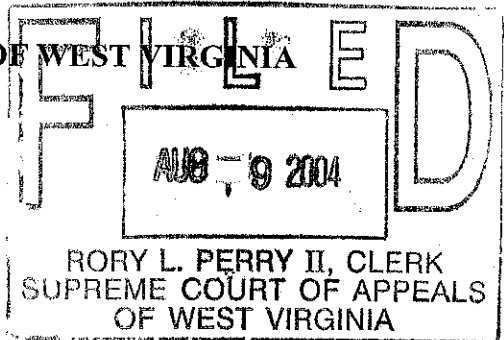


NO. ~~040409~~ 31785

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DANIEL JONES and CHRISTIE JONES,

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

**BRIEF OF APPELLANTS,
WEST VIRGINIA STATE BOARD OF EDUCATION
AND STATE SUPERINTENDENT DAVID STEWART**

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**

**BARBARA H. ALLEN
MANAGING DEPUTY ATTORNEY GENERAL
STATE BAR # 1220
OFFICE OF THE ATTORNEY GENERAL
STATE CAPITOL, ROOM E-26
CHARLESTON, WV 25305
(304) 558-2021**

*Counsel for Appellants W. Va. State Board of
Education and State Superintendent David Stewart*

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WEST VIRGINIA STATE BOARD OF EDUCATION
AND STATE SUPERINTENDENT DAVID STEWART**

Come now the West Virginia State Board of Education and David Stewart, State Superintendent of Schools, Defendants below and Appellants herein, and file the within brief in support of their Petition for Appeal.

I.

FACTS OF THE CASE

A. AARON JONES.

Plaintiff Aaron Jones was, at the time of the hearing before Judge Bloom, an 11 year old 7th grade student who, along with his siblings, is home-schooled by his mother, Christie Jones. Mrs.

Jones uses the A Beca curriculum promulgated by the Pennsacola Christian College. (Tr. 12.) The A Beca curriculum is different from the public school curriculum and utilizes different books. (Tr. 26-27.) Since Aaron's 4th grade year, his year-end assessment has been a standardized test; before that, there was a portfolio review of his work. (Tr. 17-18.) The standardized test that Aaron takes, Terra Nova, is different from the standardized test given to public school students, SAT-9. (Tr. 90-92.) The testers for home-schooled students taking the Terra Nova test do not have to be teachers; in fact, they don't even have to have a high school diploma. (Tr. 121.)

Aaron began to wrestle on the Mannington Middle School team in the fall of 2002, pursuant to a TRO granted by Judge Bloom. The experience was a positive one for him. (Tr. 156.) Aaron's wrestling coach, Rick Rinehart, testified that he was a fine young man, had no disciplinary problems, caused no problem with school spirit, and cost no extra money. (Tr. 156-60.) Mike Hayes, Marion County teacher, coach and activities director, gave similar testimony. He noted that some Catholic School students could join public school sports teams in Marion County, under the WVSSAC's "feeder rule." (Tr. 180.) He later explained that since Marion County does not have a Catholic high school, the Catholic middle schools are in fact "feeder" schools for the public high school. See pps. 189-91, *infra*.

B. APPELLEES' OTHER WITNESSES.

Edwina Pendarvis, PhD, testified that on a national level, home-schooled students' scores and achievements exceed those of public school students. (Tr. 54-55.) She admitted, however, that she does not know the statistics for West Virginia's home-schooled students. (Tr. 80, 87.) Dr. Pendarvis also testified that thirteen states have statutes and/or regulations "absolutely requiring" home-schooled students to be permitted to participate on public school sports teams, and that other

states permit it although there is no express statutory or regulatory authorization. (Tr. 62.) She admitted, however, that her opinions as to what other states do or do not allow in this regard is based on a single, unnamed, non-published doctoral dissertation. (Tr. 83- 85.) She also admitted that the standardized test Aaron Jones takes is different from the test that West Virginia's public school students take (Tr. 90-92), and that it's possible for a student to score at the 40th percentile on a standardized test but not earn a 2.0 GPA. (Tr. 97.)

Mary Ellen Sullivan testified that testers for the standardized test taken by home-schooled students do not have to be teachers, and in fact don't even have to have a high school diploma. (Tr. 121.)

Linda Sue Campbell, formerly a teacher, is now an independent portfolio reviewer who prepares transcripts for home-schooled students to submit to high schools and colleges. (Tr. 127-28, 133-34.)¹ There are only two or three independent portfolio reviewers in West Virginia. (Tr. 140.) Ms. Campbell initially agreed that one should have a teaching degree to do portfolio assessment (Tr. 139), but later backed off of this opinion. (Tr. 148.) She admitted that the transcript process requires a four-year involvement with the home-schooled student. (Tr. 141-42.)

Marianne Hughes is an independent court reporter who home-schooled her children. She testified that her children were in the public school marching band, but admitted that band was an academic class in which they were enrolled. (Tr. 197-98, 206.) The Hughes children also took speech and drama, and drivers' education, at the public school (Tr. 197-98), as permitted by W. Va. Code §18-8-1(c)(3).

¹Regular portfolio review under the statute, W. Va. Code §18-8-1(c)(2)(iii), requires only a certification that the child is working to his or her ability level. Regular portfolio review does not result in the assignment of any grades.

C. WVSSAC'S WITNESSES.

The WVSSAC put on the testimony of William Walton, Principal of South Charleston High School, Clinton Giles, Principal of Capitol High School, and James Vickers, Principal of George Washington High School.² Among them, these educators had many decades of experience as teachers, administrators and coaches; Mr. Walton alone was a teacher and coach for 37 years.

The principals testified that academics is more important than athletics to the mission of the schools, that the 2.0 rule for sports participation promotes better academic performance on the part of student athletes, and that the 2.0 rule acts as an academic incentive for those athletes. (Tr. 263-68, 277-82.) Mr. Giles noted that schools take the 2.0 rule so seriously that every year at Capital High, some of the very best players do not play. (Tr. 277, 282.) The principals all agreed that opening public school sports teams to home-schooled students would open the door to abuses, i.e., that some parents would take a poorly performing student out of school and home-school him or her in order to retain team eligibility. (Tr. 229, 286.) In response to queries about the possibility of "grading" home-schooled students every semester, the principals testified that this would not be a fair equivalency because there would be no uniformity in the grading. (Tr. 234.)³ Further, in response to queries about the standardized test that some home-schooled students take, the principals noted that scoring in the 40th or 50th percentile on a standardized test does not equate to earning a 2.0 average. (Tr. 214, 277-78.)

²The testimony of Mr. Giles, and particularly Mr. Vickers, was cut short by the court below, who refused to "... permit you to put the same testimony on through more than one witness." (Tr. 275, 286.)

³Additionally, it should be recalled that home-schooled students take a different curriculum and use different textbooks.

The principals agreed that team players are role models in the school, and that allowing home-schooled students to play on a public school's team would have a deleterious effect on school spirit. (Tr. 227-28, 264, 274.) Additionally, Mr. Vickers noted that home-schooled students on a public school sports team would not be subject to all the same disciplinary measures as their public school counterparts. (Tr. 288-89, 292-93.)

Finally, the principals testified that band activities are completely different from sports team participation. First and foremost, band is an academic class for which a grade, and credit, are given. (Tr. 231, 243.) Additionally, anyone can be in the band, since the 2.0 GPA average doesn't apply to participation in co-curricular activities, while participation on sports teams is limited both by the number of players allowed on a team and by the 2.0 rule. (Tr. 220-23.) Although the court below attempted to suggest that sports team participation could somehow be linked to physical education classes, Mr. Walton (and later Mike Hayden, Executive Director of the WVSSAC) explained that this just doesn't work. (Tr. 261, 303-04.)

Mike Hayden supported the evidence of the principals on all of the major points raised by their testimony (Tr. 316-22), and noted that when a proposed rule change for home-schooled students was considered by the Board of Control, which consists of the principals of every single school in the WVSSAC, it was defeated by a vote of 99-0. (Tr. 311, 354.)

Mr. Hayden then gave testimony with respect to certain WVSSAC rules on which there seemed to be some confusion.

The "feeder rules" permit 9th graders in a junior high/middle school to participate on the team of the high school which they will attend from 10th - 12th grade, assuming that their junior high/middle school does not itself have a team, since students are eligible for four years of high

school sports. (Tr. 312-13.) The rules do not permit students to play on any other school's teams, contrary to the insinuations of plaintiffs' counsel. Further, parochial junior high or middle school students can take advantage of the "feeder rules" only if (1) there is no parochial high school in the county, and (2) the parochial school is a WVSSAC member. (Tr. 189-91.)

The "co-op rules" permit two or more schools, none of which have enough students to field a team and all of which are feeder schools for the same high school, to form a joint team. The "co-op rules" apply only to eighth graders. (Tr. 313-15.)

All school activities that aren't part of a class are extracurricular, and thus subject to the 2.0 rule: sports teams, student council, drill team, drama, choir, chess club and the like. (Tr. 302-03, 205-06.) Band is different, as it is co-curricular; students who play in the band do so as part of taking a band class at the school. (Tr. 205-06, 231.) Thus, the enrollment rule and the 2.0 rule do not apply. (Tr. 299-300, 338.) No schools have what the court below termed "volunteer" bands. (Tr. 358.)

Despite the suggestion of the court below that sports team participation could be a part of a P.E. class, Mr. Hayden explained that this link-up was specifically disallowed because of the abuses that resulted. (Tr. 303-04.) Mr. Hayden also noted that the widespread assumption that all coaches are P.E. teachers is not correct, leading to a situation in the past where "... we were not following the prescribed physical education curriculum." (Tr. 304.)

Finally, WVSSAC rules apply only to schools in the WVSSAC, and, contrary to the assertion of plaintiffs' counsel, not all public schools have opted to join the WVSSAC. (Tr. 335.)

D. STATE BOARD OF EDUCATION'S AND DR. STEWART'S EVIDENCE.

The State Board of Education and Superintendent Stewart did not put on any witnesses. However, they put into evidence Dr. Stewart's answers and responses to the Appellees' discovery requests, together with the documents appended thereto.⁴

In contrast to the testimony of Dr. Pendarvis, documentation of a survey conducted by the West Virginia Department of Education, see Exhibit E to discovery requests, demonstrated that in the thirty (30) responding states, home-schooled students are not eligible to participate in extracurricular activities in twenty-one (21), are eligible to participate in six (6), and may participate at the election of the local school or district in three (3).

II.

ISSUES PRESENTED

1. The court below erred as a matter of law in concluding that participation on interscholastic athletic teams is an "educational resource" within the meaning of W. Va. Code § 18-8-1(c)(3).

2. The court below erred as a matter of law in concluding that because home-schooled students may participate in band, a co-curricular activity, then there is no basis on which to prohibit their participation in athletics, an extra-curricular activity.

⁴ See "Answers and Responses of Defendant David Stewart, State Superintendent of Schools, to Plaintiffs' Interrogatories and Requests for Production of Documents," together with "Exhibits A Through E of Answers and Responses of Defendant David Stewart, State Superintendent of Schools, to Plaintiffs' Interrogatories and Requests for Production of Documents."

3. The court below impermissibly substituted its judgment for that of the Legislature in concluding that there exists no rational basis for the exclusion of home-schooled students from participating on public school sports teams.

4. The court below was clearly erroneous in its factual determination that there exists no rational basis for the exclusion of home-schooled students from participating on public school sports teams; the uncontroverted testimony of three high school principals and the Executive Director of the WVSSAC was clearly to the contrary.

5. The court below failed to give proper weight – indeed, any weight – to the policies of the West Virginia Board of Education and the legislative rules of the West Virginia Secondary Schools Activities Commission, the latter having the force and effect of law.

6. The court below imposed an impossible mandate: the creation of some system whereby the academic progress of home-schooled students who wish to participate on sports teams can be evaluated in a way that is fair to public and parochial school students, who are subject to the 2.0 rule. The testimony of the Appellees' own witness was that there are only three individuals in the state who do equivalency grading for home-schooled students, and that this process requires following the students for four years.

7. The court below failed to consider that the logic of its opinion would apply not only to home-schooled students, but also to private and parochial school students whose schools do not field a team.

III.

ARGUMENT

A. THE COURT BELOW ERRED AS A MATTER OF LAW IN CONCLUDING THAT PARTICIPATION ON INTERSCHOLASTIC ATHLETIC TEAMS IS AN “EDUCATIONAL RESOURCE” WITHIN THE MEANING OF W. VA. CODE §18-8-1(C)(3).

Although the court below acknowledged the holding of Bailey v. Truby, 174 W. Va. 8, 321 S.E.2d 318 (1984), that participation in interscholastic sports is not a constitutional right, he overruled the case *sub silentio* by finding sports to be an “educational resource” within the meaning of W. Va. Code §18-8-1(c)(3).

The court’s interpretation of §18-8-1(c)(3) is not consistent with the statutory language, which provides:

The superintendent or a designee shall offer such assistance, including *textbooks, other teaching materials and available resources*, as may assist the person or persons providing home instruction subject to their availability. Any child receiving home instruction may, upon approval of the county board of education, exercise the option to *attend any class* offered by the county board of education as the person or persons providing home instruction may deem appropriate subject to normal registration and attendance requirements.

(Emphasis supplied.)

It is readily apparent that this statute deals with academics and co-curricular activities; not extracurricular activities; to read it any other way would render all of the qualifying language superfluous. If a wrestling team is an “educational resource,” so is every class, club, instrumental or vocal group, drama production, field trip, sports team, pep rally, or any other educational or developmental experience whatsoever.

The court ignored the uncontroverted evidence, set forth in the statement of facts above, that co-curricular activities, i.e., band, are part of a *class* that all participants, including home-schooled students, must attend. Despite the court's heroic attempts, through his questioning of the witnesses, to establish the notion of "independent bands," the testimony established that there's no such thing. Further, despite the court's attempts, again through his questioning of the witnesses, to suggest that sports could somehow be co-curricular with P.E. classes, the testimony established the impossibility of doing this.

In formulating its expansive interpretation of W. Va. Code §18-8-1(c)(3), the court below ignored and discounted the contrary, and longstanding, interpretation of the agencies specifically charged with enforcing the statute. See, e.g., West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 335, 472 S.E.2d 411, 420 (1996) ("An agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference. Courts must, however, reject administrative orders and rules that are contrary to legislative intent."). In this case, the interpretation of the Appellants is contained not only in State Board Policies 2510, § 5.18 and 2436.10, but also in WVSSAC Legislative Rules 127-2-3.1, 127-2-3.2, 127-2-3.5, 127-2-6.1 and 127-2-6.9. This Court recently clarified whatever uncertainty may have existed with respect to the force and effect of legislative rules. Syl. Pt. 5, Smith v. UPS, No. 31645, 2004 WL 1489057 (W. Va. July 3, 2004): "A regulation that is proposed by an agency and approved by the Legislature is a 'legislative rule' as defined by the State Administrative Procedures Act, W. Va. Code, 29A-1-2(d)[1982], and such a legislative rule has the *force and effect of law.*" (Emphasis supplied.)

The court below also failed to consider or address the necessary extension of its logic to *all* non-public school students, since there is no principled way to distinguish between them with respect to their entitlement to “educational resources.” Here, if the Mannington Middle School wrestling team is an “educational resource” that must be available to home-schooled students residing within the geographical area served by the school, how can team participation be denied to any private or parochial school students residing in the same area, whose schools do not field a team? If a wrestling team is an “educational resource,” how could we say that a football team is not? If Capital High School in Charleston is required to open its football team to home-schooled students, how could we deny this “educational resource” to students at Charleston Catholic, which doesn’t have a team?

By interpreting W. Va. Code §18-8-1(c)(3) in a manner that would “finesse” the holding of Bailey v. Truby, the court below substituted his judgment for that of this Court, the Legislature,⁵ and all of the institutional Appellants. He simply made policy decisions and, in so doing, far exceeded the scope of his judicial authority.

B. THE COURT BELOW ERRED AS A MATTER OF LAW IN CONCLUDING THAT BECAUSE HOME-SCHOOLED STUDENTS MAY PARTICIPATE IN BAND, A CO-CURRICULAR ACTIVITY, THEN THERE IS NO BASIS ON WHICH TO PROHIBIT THEIR PARTICIPATION IN ATHLETICS, AN EXTRA-CURRICULAR ACTIVITY.

A review of the transcript, as well as the court’s memorandum opinion, demonstrates that home-schooled students’ eligibility to play in school bands was the key to the court’s decision. Simply put, the court couldn’t see the difference between playing in a band and playing on a sports

⁵The evidence established that attempts to secure a “legislative fix” have been completely unavailing.

team, despite the fact that the uncontradicted evidence showed the differences to be real and substantial.

a. Under Board Policy 2510, § 5.18, band activities are co-curricular while athletics are extracurricular.

b. Co-curricular activities are part of a class, i.e., students playing in the band must be enrolled in band class.

c. In contrast, extra-curricular activities, including sports, are just that: extra. They are not part of any class.

d. Co-curricular activities are not subject to the 2.0 rule, since they are part of a school's academic program.

e. In contrast, all extracurricular activities are subject to the 2.0 rule.

In this case, the court just ignored these distinctions and, in so doing, again ignored the teaching of Bailey v. Truby, *supra*. And again, the court failed to consider the far-reaching implications of his decision; if we're going to ignore the co- or extra-curricular nature of activities, then there can be no principled basis for denying home-schooled students the right to run for student council in a school they don't even attend.

C. THE COURT BELOW IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE LEGISLATURE IN CONCLUDING THAT THERE EXISTS NO RATIONAL BASIS FOR THE EXCLUSION OF HOME-SCHOOLED STUDENTS FROM PARTICIPATING ON PUBLIC SCHOOL SPORTS TEAMS.

The decision of the court below flows naturally from his statutory interpretation: if a wrestling team is an "educational resource," then it cannot be denied to a class of students unless the State can demonstrate a rational basis for its decision.

In this regard, this Court has held that public and nonpublic students are not similarly situated for purposes of equal protection analysis. Janasiewicz v. Bd. of Educ. of the County of Kanawha, 171 W. Va. 423, 299 S.E.2d 34 (1982). In the proceedings below the Appellees contended that the two classes in Janasiewicz were public school and parochial school children, thus leaving the door open for home schooled children to be treated as a distinct, separate class. To the contrary, the question posed in Janasiewicz was: "Must *nonpublic* students be bussed?", 171 W. Va. at 426, 299 S.E.2d at 37, and Syllabus Point 2 of the opinion provides that "[t]he Equal Protection Clause of the Fourteenth Amendment is not violated by treating public and *nonpublic* school children differently in allocations of state aid and educationally related resources." (Emphasis supplied in both quotations.) See also State ex rel. Cooper v. Bd. of Educ., 197 W. Va. 669, 478 S.E.2d 341 (1996), Syllabus Point 3. In both Janasiewicz and Cooper, the basis for finding that the parochial school plaintiffs were not similarly situated with public school students was that the former "... ha[ve] chosen to reject a free public school education in favor of privately paid education . . .," a rationale that applies equally to home schooled children, who have chosen to reject a free public school education in favor of instruction in the home.

Applying the rational basis test, it is clear that WVSSAC Rule 127-2-3.1 serves important governmental interests, all of which were rejected by the court below.

1. The Promotion of Academics Over Athletics.

Pursuant to West Virginia Board of Education Policy 2436.10 and WVSSAC Rule 127-2-6.9, students must maintain a 2.0 grade point average in order to be eligible for sports. Further, pursuant to WVSSAC Rule 127-2-6.1, students must earn passing marks each semester in four full credit subjects; failure to do so renders a student ineligible for the following semester. These rules ensure

regular monitoring of students' academic progress, utilizing uniform standards and performance measures. The rules function both as a carrot and a stick.

As Judge Cookman has noted, "... a home schooled child's progress is monitored, but only once a year through a standardized test or through the examination of the student's work portfolio. In the public school there is periodic examination of the student's work through testing, homework, and more importantly a report card. At the end of each semester or grading period that student must maintain the 2.0 grade point average required by the WVSSAC." Gallery v. West Virginia Secondary Schools Activities Comm'n, Civil Action No. 97-C-34 (Circuit Court of Hampshire County, June 8, 1998).⁶

To permit home schooled students to participate in interscholastic athletics would not only dilute the rigorous academic eligibility rules established by the Board and the WVSSAC but also have the perverse result of giving home schooled students a tremendous advantage over enrolled school students. State law requires only one yearly review of the academic progress of a home schooled child. Progress is deemed satisfactory if the child (a) scores at or above the 50th percentile on a standardized test,⁷ or at least shows improvement from the previous year's results; or (b) participates in the state's current testing program; or (c) provides the county superintendent with a written narrative indicating that a portfolio of samples of the child's work has been reviewed and that his or her progress is in accordance with his or her abilities; or (d) provides the county

⁶As noted earlier, the appeal from Judge Cookman's decision was dismissed as moot by this Court. Gallery v. West Virginia Secondary Schools Activities Comm'n, 205 W. Va. 364, 518 S.E.2d 368 (1999).

⁷Significantly, the evidence was that Aaron Jones, and many other home-schooled students, take a different standardized test than the one administered to public school students.

superintendent with some sort of alternative academic assessment of proficiency. W. Va. Code § 18-8-1(c)(2)(D)-(i-iv). School enrolled students, in contrast, have to maintain a 2.0 grade point average, and they have to do it every semester.

The court below rejected this as a rational basis, concluding that the Appellants have a duty to write some sort of regulations allowing home-schooled students' academic progress to be monitored and graded on a quarterly basis. The court did not even stop to consider the fact that Aaron Jones is taking a completely different curriculum, with different homework assignments and different tests, making a quarterly comparison of his grades and those of his public school peers problematic at best and probably meaningless. Further, the testimony of Appellees' own witness, Linda Sue Campbell, was that there are only three individuals in the state who do "equivalency grading" for home-schooled students, and that this process requires monitoring the students for four years. Finally, the uncontradicted testimony of three high school principals, having among them close to a century in experience, was that some parents will attempt to take advantage of any relaxation of the strict 2.0 rule by withdrawing their children from school and thereafter home-schooling them in order to keep them sports-eligible.

2. Allocating Educational Dollars.

The court below simply ignored the testimony of three high school principals who testified that financial considerations would come into play if public school sports teams were open to everyone who wanted to play. This seems such a self-evident proposition that it is difficult to determine why the court below was so reluctant to even entertain the possibility.

County school boards receive funding formula dollars based on their enrollment of full time students in the public schools, and with these dollars they are required to fund a thorough and

efficient education. Every dollar spent involves hard choices in these hard times; and every dollar spent on athletics is a dollar that's not available for academics and academic enrichment programs.⁸

Athletic programs involve facilities, maintenance, coaches, officials, uniforms and equipment costs, just to name a few.

Since West Virginia's 4,673 home schooled students don't count in the funding formula, every educational service required to be provided to them under West Virginia law is, in practical effect, an unfunded mandate for the county boards of education. The decision below effectively adds another such mandate by broadening eligibility for public school sports programs to include students who have rejected a free public school education and, in the process, opted themselves out of the funding formula.

The court below held that because the addition of one student to a junior high school wrestling team didn't cost the school any money, fiscal considerations could not be considered a rational basis for excluding non-public school students from membership on public school sports teams. The court also noted the absence of any proof that the involvement of home-schooled students in band has created any financial problems, apparently assuming that the cost of sponsoring a band is not materially different from the cost of sponsoring sports teams. Again, the court ignored the fact that band is a co-curricular activity, and therefore its cost is immaterial. Enrolling in a class at the school, as a home-schooled student must do in order to be in the band, brings the student within the unambiguous language of W. Va. Code § 18-8-1(c)(3), which provides that "... [a]ny

⁸Although some high school football and (boys') basketball programs may generate enough revenue to offset a significant portion of the cost involved, secondary school sports programs are not financially self-sufficient and it is unrealistic to expect them to be.

child receiving home instruction may, upon approval of the county board of education, exercise the option to attend any class offered by the county board of education. . . . “

3. **School “Community” and Spirit.**

All of the principals testified that athletes are role models for the other students, and that allowing home-schooled students to participate on sports teams would have a deleterious effect on school spirit. (Tr. 227-28, 264, 274.)

School sports programs create school *esprit de corps*, which has been designated an important asset in every single school consolidation case ever litigated in this state. It hardly needs argument that a home schooled student, who has rejected membership in the school’s student body, is not a logical representative of the school in athletic events.

In Bradstreet v. Sobol, 650 N.Y.S.2d 402, 225 A.D.2d 175 (1996), in a case presenting the same issues as are presented here, the New York Supreme Court, Appellate Division, affirmed the trial judge’s grant of summary judgment to the education defendants. The court held that:

Defendant asserts several grounds as the justification for the enrollment requirement, including that it promotes school spirit and loyalty. Plaintiff questions both the meaning and importance of the concepts of school spirit and loyalty, but we are of the view that the concepts are directly related to the definition of interschool activities. . . . *We think it is rational to require that a student who seeks to represent a school in interscholastic competition be enrolled in the school. Having elected to provide home schooling in lieu of sending her daughter to public school, plaintiff has no legitimate claim that her daughter is an appropriate representative of the public school for competition with other schools.*

Id., 650 N.Y.S.2d at 404, 225 A.D.2d at 178.

In this case, the court below rejected the school spirit and loyalty rationale as “insular” and thus (apparently) unworthy of consideration. The court also noted (*de hors* the record) that a prominent athlete from Kanawha County got himself into criminal trouble, thus demonstrating that

student athletes are not necessarily better representatives of their schools than home-schooled students would be. Finally, the court below seems to believe that WVSSAC Rules 127-2-3.2 - 127-2-3.5 permit school students to freely hop around to other schools' teams; from there, or so the argument goes, it's a short step to the conclusion that there's no legitimate state interest in school community.

An examination of the rules in question demonstrates that the general rule, "[s]tudents can participate only in schools in which they are enrolled . . .," has only a few limited exceptions, none of which support the conclusions of the court below. First, a middle school without enough students to put together a team may combine *with another feeder school for the same high school* to form a team. Ninth graders *in a feeder school* may participate on their high school team, and sixth grade students *in a K-6 feeder school* may participate on their junior high team. The common link is that the athletes in question will all end up at the same school; thus, the rules serve the interest of school community and student body cohesiveness. Second, students in a junior high or middle *feeder school* who are ineligible to play on their teams because of age, may move up to their respective high school teams. The same rationale applies. Third, students at the West Virginia School for the Deaf and the Blind may participate in each other's sports programs.

Contrary to Appellees' claims (and the court's apparent conclusion), that's it. High school students can play only for their own school's teams; if the school doesn't have a team, the students don't play. Public school students can't play on parochial or private school teams, and vice versa, at any school level. Only middle and junior high schools that are feeders for the same high school can take advantage of the "pooling" rules, and then only if one of the schools in question doesn't have enough students to form a team. Eligible 6th and 9th graders can take advantage of the "jump

ahead” rules only if their age makes them ineligible for their own K-6 or middle school teams, and they are limited to playing for the middle/junior or high school that they’ll be entering the following year.

4. **The Carrot and Stick.**

As the principals and the WVSSAC’s Executive Director testified, the Board’s and the WVSSAC’s stringent academic eligibility policies provide a powerful carrot and stick for student athletes. They provide an incentive for some otherwise academically disinclined students to not only stay in school but also make the grades. They provide a lesson about actions and their consequences for students who let their grades slide: goodbye team.

The Appellants argued as follows: Imagine the effect on morale when Joe, who worked pretty hard but didn’t quite make a 2.0 average for the semester, runs into his neighbor Jim, who’s home schooled and therefore won’t have his work reviewed until the end of the year and even then doesn’t have to pull a 2.0 GPA. See W. Va. Code § 18-8-1(c)(2)(D)(i-iv). Joe’s off the basketball team; Jim stays on it. Would this be fair? Is there any doubt that Joe would soon be in court?

In response to this, the court below concluded that the Appellants could craft a rule that would allow quarterly evaluation of Jim’s work and the assignment of a GPA. The problem with this analysis is that it just can’t work. Joe is taking the curriculum required by the West Virginia Board of Education; Jim is taking a different curriculum. (It will be recalled that in this case, Aaron Jones is taking the Bible based A Beka curriculum.) Joe and Jim have different homework assignments, different writing assignments, and different tests. Joe’s grades are assigned by the same group of teachers who are evaluating the work of the whole student body. Jim’s grades are assigned by his mother.

It is difficult to envision the contours of a rule that would fairly compare Joe's GPA with Jim's, assuming that we could figure out how to assign Jim a GPA in the first place. It is even more difficult to determine why and how the court below concluded that drafting such a rule could be accomplished easily.

In rejecting all of the Appellants' evidence establishing a rational basis for the exclusion of home-schooled students from public school sports teams, what the court below really rejected was the judgment of the Legislature. The Legislature, in apparent agreement with the letter and the spirit of Bailey v. Truby, *supra*, has consistently refused to amend W. Va. Code §18-8-1(c)(3) to allow home-schooled students to play on public school sports teams. It has approved WVSSAC's enrollment rule for sports participation – a rule perfectly consistent with Board Policy 2510, § 5.18. The policy of the Legislature may not be one favored by the court below, but the bottom line is that policy is not the court's call.

D. THE COURT BELOW WAS CLEARLY ERRONEOUS IN ITS FACTUAL DETERMINATION THAT THERE EXISTS NO RATIONAL BASIS FOR THE EXCLUSION OF HOME-SCHOOLED STUDENTS FROM PARTICIPATING ON PUBLIC SCHOOL SPORTS TEAMS; THE TESTIMONY OF THREE HIGH SCHOOL PRINCIPALS AND THE EXECUTIVE DIRECTOR OF THE WVSSAC PROVIDED OVERWHELMING EVIDENCE TO THE CONTRARY.

The court below simply rejected, on a wholesale basis, the testimony of three high school principals and the Executive Director of the WVSSAC, notwithstanding their decades of experience and knowledge. Instead, the court rested its rational basis decision on the Appellees' evidence that (a) there are three individuals in West Virginia who assign equivalency grades for home-schooled students needing a transcript, (b) Aaron Jones' participation on a junior high wrestling team did not interfere with school spirit or cause any problems, (c) Aaron's participation did not result in

increased expense to the school, and (d) Aaron's parents would not allow him to play sports if he let his schoolwork slip.

(Focusing for a moment on the issue of grades, it is unclear whether the court envisions the emergency of a new cottage industry of "equivalency graders" for home-schooled athletes, or whether he expects West Virginia's teachers to undertake yet another duty – grading the work of home-schooled students who are studying a different curriculum and taking different tests.)

The overwhelming evidence in this case supports the Appellants' position that there exists a rational basis for the exclusion of home-schooled students from public school sports teams. The contrary finding of the court below was clearly erroneous.

E. THE COURT BELOW FAILED TO GIVE PROPER WEIGHT – INDEED, ANY WEIGHT – TO THE POLICIES OF THE WEST VIRGINIA BOARD OF EDUCATION AND THE LEGISLATIVE RULES OF THE WEST VIRGINIA SECONDARY SCHOOLS ACTIVITIES COMMISSION, THE LATTER HAVING THE FORCE AND EFFECT OF LAW.

It has long been the law that "... an administrative rule or regulation must be clearly illegal, or plainly and palpably inconsistent with law, or clearly in conflict with a statute relative to the same subject matter, such as the statute it seeks to implement, in order for the court to declare it void on such ground." Detch v. Bd. of Educ. of Greenbrier County, 145 W. Va. 722, 729, 117 S.E.2d 138, 142 (1960). In this case, WVSSAC Rule 127-2-3.1 is not inconsistent with anything in the law; to the contrary, in his findings of fact in the Gallery case, Judge Cookman noted that "[t]he Plaintiff and his parents attempted unsuccessfully to achieve a rule change through both the WVSSAC and the West Virginia Legislature to permit home schooled children the opportunity to participate in athletics in the public schools before filing this suit for injunctive relief"

Another general principle of law is that rules and regulations must be reasonable. A close analysis of this Court's jurisprudence demonstrates that the rules at issue here pass the test.

In Hamilton v. Secondary Schools Activities Comm'n, 182 W. Va. 158, 386 S.E.2d 656 (1989), this Court examined the WVSSAC's rules governing the number of years a student remains eligible to play interscholastic sports after he or she has been held back in grade. Finding that the purpose of the rule is to prevent the practice known as red-shirting, the Court concluded that it would be unfairly and unreasonably punitive to apply it in situations where students are held back for genuine academic reasons. In such a case, the student has already suffered a year of academic non-eligibility and shouldn't have to suffer a second purely on the basis of an irrebutable presumption of red-shirting.

The case of State ex rel. Lambert v. West Virginia State Bd. of Educ., 191 W. Va. 700, 447 S.E.2d 901 (1994), was brought by a public school student who, because of her hearing disability, required the services of a signer in order to participate on the girls' basketball team. The West Virginia State Board of Education ("the Board") and the WVSSAC agreed that the plaintiff was entitled to the services of a signer as a reasonable accommodation for her handicap, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. This claim was decided on federal statutory grounds.

The Court also used Lambert as a vehicle for deciding whether different seasons for boys' and girls' basketball denied the latter equal access to their respective schools' interscholastic athletic programs. Significantly, the Court invited the Board to argue facility limitations, personnel constraints and/or financial constraints which could support the status quo, but the Board declined to do so because its own rules mandated equal access for all eligible students, boys and girls, to all

school programs and activities. Accordingly, the Court held that a school's division of basketball activities into two distinct "seasons," one far less favorable than the other, constituted gender-based discrimination prohibited by the W. Va. Const., art. III, § 10, and the Human Rights Act, W. Va. Code § 5-11-1 et seq.

The case of Bailey v. Truby, supra, was a challenge both to the WVSAC's academic eligibility requirements for participation in interscholastic sports, and also to the Kanawha County School Board's even more stringent eligibility requirements.⁹ In the course of upholding both rules, the Court noted that ". . . the overwhelming majority of courts have held that participation in interscholastic athletics or other extracurricular activities is not a constitutionally protected liberty or property interest . . .," Bailey, 174 W. Va. at 20, 321 S.E.2d at 314 (citing dozens of authorities), and put West Virginia firmly in the majority camp, at least with respect to what the Court designated "nonacademic extracurricular activities," including athletics. Bailey, 174 W. Va. at 11, 321 S.E.2d at 305-06, 313. See also Harris v. West Virginia Secondary School Activities Comm'n, 679 F.2d 881 (4th Cir. 1982) ("participating in interscholastic athletics is only a mere expectation rather than a constitutionally protected claim of entitlement and, thus, falls outside the protection of due process").

The case of State ex rel. White v. Parsons, 199 W. Va. 1, 483 S.E.2d 1 (1966), was a jail inmate's challenge to a blanket rule promulgated by the Jail and Correctional Facilities Standards Commission prohibiting smoking in all regional jails. The Court struck down the rule because the Commission had failed to follow the requirements of the Administrative Procedures Act, W. Va.

⁹As a condition of eligibility, WVSSAC regulations required a 2.0 grade point average. Kanawha County upped the ante, so to speak, requiring not only a 2.0 GPA but also a passing grade in every course.

Code § 29A-3-1 et seq., in promulgating it. Most notably, the Commission failed to give adequate notice of proposed rule making to jail inmates, the forgotten stakeholders in all this, and ignored the “well-founded professional objections” of the Commissioner of Corrections.

None of these cases would support the conclusion of the court below that WVSSAC 127-2-3.1 is constitutionally unreasonable and therefore without the force and effect of law. See Smith v. UPS, *supra*. It is well settled that public and nonpublic school children may be treated differently in allocations of state aid and educationally-related resources, Janasiewicz v. The Bd. of Educ. of the County of Kanawha, 171 W. Va. at 425-26, 299 S.E.2d at 37; State ex rel. Cooper v. Bd. of Educ., *supra*, Syllabus Point 3. It is equally well settled that participation in athletics is a privilege rather than a right and thus beyond the ambit of the due process clause. Bailey v. Truby, *supra*; Harris v. West Virginia Secondary School Activities Comm’n, *supra*.

There’s nothing unreasonable about limiting the privilege of participation in interscholastic athletic programs to full time students enrolled in WVSSAC member schools. To the contrary, the rule serves valid interests and easily passes the test of reasonableness.

First and foremost, as discussed earlier, all students must meet academic eligibility standards in order to participate in interscholastic athletic activities. Students enrolled in a school are enrolled in the same curriculum and graded against a fixed set of standards, with their eligibility to participate in extracurricular activities being determined and then redetermined at fixed grading periods. In contrast, home schooled students generally utilize a completely different curriculum and are graded against whatever standards the home school provider establishes. There are no grading periods at which to determine and redetermine eligibility, and even if there were, there’s no rational way to compare a home-schooled student’s GPA against a public school student’s GPA. The annual testing

given to non-public school students (or the portfolio review) provides only the basis for their exemption from compulsory public school attendance; it does not provide an academic eligibility yardstick that corresponds to the public schools' regular grade reports.

Second, extracurricular teams, including sports teams, represent a school while engaging in the team activity; a non member of a school is not a logical representative of the school.

Third, home schooled students are under the authority and responsibility of their parents, while public school students are under the authority and responsibility of school personnel (teachers and administrators) who act *in loco parentis* when the students are in school. In this regard, all of the principals testified that an athlete's disciplinary infractions may be dealt with in a variety of ways other than just throwing him or her off the team, which would be the *only* sanction available for a home-schooled student.

A significant majority of states deem home schooled students to be ineligible for participation in school-based extracurricular activities. Thus, West Virginia's policy with respect to this issue is not an aberration and in fact is in accord with the majority view.

F. THE COURT BELOW IMPOSED AN IMPOSSIBLE MANDATE: THE CREATION OF SOME SYSTEM WHEREBY THE ACADEMIC PROGRESS OF HOME-SCHOOLED STUDENTS WHO WISH TO PARTICIPATE ON SPORTS TEAMS CAN BE EVALUATED IN A WAY THAT IS FAIR TO PUBLIC AND PAROCHIAL SCHOOL STUDENTS, WHO ARE SUBJECT TO THE 2.0 RULE. THE TESTIMONY OF THE APPELLEES' OWN WITNESS WAS THAT THERE ARE ONLY THREE INDIVIDUALS IN THE STATE WHO DO EQUIVALENCY GRADING FOR HOME-SCHOOLED STUDENTS, AND THAT THIS PROCESS REQUIRES FOLLOWING THE STUDENTS FOR FOUR YEARS.

Contrary to the opinion of the court below, the Appellants find it difficult to even conceive of a rule that could fairly and meaningfully compare apples to oranges. We are left with several alternatives.

First, we could just abolish the 2.0 rule, since there's no rational way to apply it to students studying different curriculums, taking different tests, and being graded by teachers on the one hand and parents on the other. Instead, we could substitute a requirement that athletes must score in the 50% percentile on a yearly standardized test or have a portfolio of their work reviewed or demonstrate satisfactory progress in light of their abilities. This would probably not pass muster under Bailey v. Truby, supra.

Second, we could circumvent the 2.0 rule by declaring sports to be co-curricular with -- with what? The uncontroverted testimony was that when sports teams were supposedly a part of P.E. class, this led to such widespread abuse that the linkage between the two was expressly forbidden. (And, in any event, P.E. is a one year class.) There's no other academic course logically related to sports, unless we administratively declare teams to be co-curricular with whatever classes are taught by the coach, which would make no sense at all and be a sham on its face.

Third, we could require that any home-schooled students wishing to play on sports teams have grade equivalencies assigned to their work by individuals such as Linda Sue Campbell. This would probably lead to a lawsuit on behalf of home-schooled students whose parents can't afford to employ an individual reviewer, since they could claim that educational resources were being denied to them on the basis of their indigence. (In this regard, it will be recalled that the court below found sports teams to be an educational resource under W. Va. Code § 18-8-1(c)(3).)

Fourth, we could require teachers to take on the duty of grading students who are not in their classes, in order to assure some consistency in application of the 2.0 rule. This, of course, would require that grades be assigned only on the basis of written work, since there would be no way to assign points to a home-schooled student for class participation, oral reports and the like. It would also require that teachers make nuanced decisions as to how work in one curriculum compares to work in another, and how one set of tests stacks up against another set. The schools would have to figure out how to fit these tasks within the time constraints of the teachers' days and within the parameters of the teachers' contracts.

Fifth, we could simply require home-schooling parents to assign grades to their children's work, and then accept those grades at face value. This will undoubtedly lead to lawsuits by public school students who could (reasonably) complain that home-schooled students have an unfair advantage in reaching the 2.0 goal for sports eligibility.

This seems to exhaust the possible options within the existing statutory framework. None of them are fair, and none of them even appear to be fair.

G. THE COURT BELOW FAILED TO CONSIDER THAT THE LOGIC OF ITS OPINION WOULD APPLY NOT ONLY TO HOME-SCHOOLED STUDENTS, BUT ALSO TO PRIVATE AND PAROCHIAL SCHOOL STUDENTS WHOSE SCHOOLS DO NOT FIELD A TEAM.

The court below also failed to consider or address the necessary extension of its logic to *all* non-public school students, since there is no principled way to distinguish between them with respect to their entitlement to "educational resources," which is what the court held sports teams to be. As of June, 2003, there were 13,143 parochial school students in West Virginia. Under the analysis of the court below, if the Mannington Middle School wrestling team is an educational resource that must be available to home-schooled students residing within the geographical area served by the school, how can team participation be denied to any private or parochial school students residing in the same area, whose schools do not field a team? If a wrestling team is an educational resource, how could we say that a football team is not? If Capital High School in Charleston is required to open its football team to home-schooled students, how could we deny this educational resource to students at Charleston Catholic, which doesn't have a team?

IV.

CONCLUSION

The decision of the court below simply will not withstand analysis. Reduced to its essence, the court decided that "if you can be in the band, you can be on the team." To reach this conclusion, the court simply jettisoned the distinction between academic and non-academic pursuits, and between co-curricular and extra-curricular activities. The court further ignored Board policies and WVSSAC legislative rules. It substituted its judgment for that of the Legislature and for that of the Court in Bailey v. Truby, *supra*.

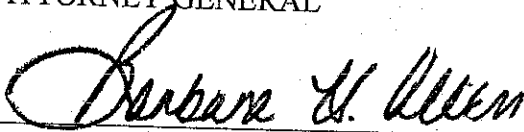
For all of the reasons set forth in this brief and apparent on the face of the record, the court's decision should be reversed.

Respectfully submitted,

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

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



BARBARA H. ALLEN, State Bar #1220
MANAGING DEPUTY ATTORNEY GENERAL
Office of the Attorney General
State Capitol, Room E-26
Charleston, WV 25305
(304) 558-2021

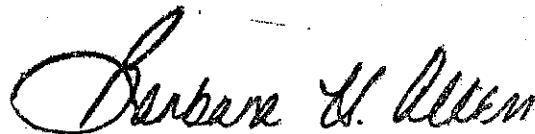
CERTIFICATE OF SERVICE

I, Barbara H. Allen, hereby certify that copies of the within "Brief of Appellants, West Virginia State Board of Education and State Superintendent David Stewart" were served on all parties to this litigation, by first class mail to their respective counsel at the following addresses, on this the 9th day of August, 2004:

Randal A. Minor, Esq.
WVU College of Law Appalachian
Center for Law & Public Service
P. O. Box 6130
Morgantown, WV 26506
Counsel for Plaintiffs/Appellants

William Wooton, Esq.
The Wooton Law Firm
P. O. Box 2600
Beckley, WV 25802-2600
Counsel for WVSSAC

Stephen Brooks, Esq.
Flaherty, Sensabaugh & Bonasso
7000 Hampton Center, Suite 1
Morgantown, WV 26505
Counsel for Marion County Board of Education
and County Superintendent Thomas Long



BARBARA H. ALLEN