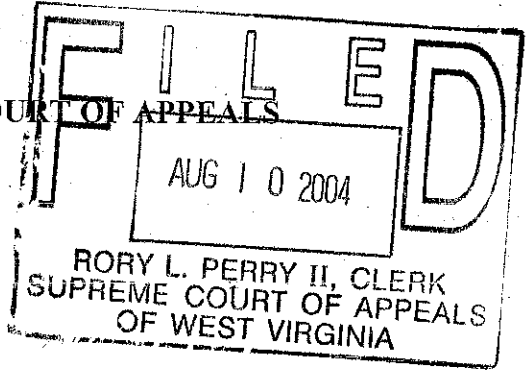


IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston



DANIEL JONES AND CHRISTY 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.

Appeal No.: 31785 & 31786

**BRIEF OF APPELLANT**  
**WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMMISSION**  
**APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

William R. Wooton  
THE WOOTON LAW FIRM  
Attorney at Law  
P.O. Box 2600  
Beckley, WV 25802  
(304) 253-2222  
*Counsel for Appellant*

## TABLE OF CONTENTS

Table of Citations.....	ii
Procedural History.....	3
Statement of Facts.....	5
Standard of Review.....	6
Summary of Arguments.....	8
Argument.....	9
I. Participation in interscholastic athletics is not “an available educational resource” as that term is used in West Virginia Code § 18-8-1(c)(3).....	9
II. The rule promulgated by the state Board of Education, which limits participation in interscholastic athletics to students enrolled in public schools, has a rational basis.....	14
III. The rule limiting participation in interscholastic athletics to enrolled students is a reasonable regulation, not in conflict with this Court's holding in <u>Hamilton v. Secondary Schools Activities Commission</u> , 386 S.E. 2d 656 (W.Va. 1989).....	22
IV. The rule limiting participation in interscholastic athletics to enrolled students should be upheld based on the administrative law principle of deference.....	25
Conclusion.....	28

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE:</u>
<u>Allen A. v. Jennifer J.A.</u> , 201 W.Va. 736, 500 S.E.2d 552 (1997).....	6, 7
<u>Angstadt v. Midd-West School District</u> , 286 F. Supp. 2d. 436 (M.D. Penn. 2003).....	22
<u>Appalachian Power Co. v. State Tax Department of West Virginia</u> , 195 W.Va. 573, 466 S.E.2d 424, 440 (1995).....	25
<u>Art Gaines Baseball Camp, Inc. v. Houston</u> , 500 S.W.2d 735, 741 (Mo.Ct.App. 1973), 1973-2 Trade Cases P 74, 855(Mo. App. Oct. 09, 1973).....	26
<u>Bailey v. Truby</u> , 174 W.Va. 8, 321 S.E.2d 302 (1984).....	14
<u>Bradstreet v. Sobol</u> , 225 A.D.2d 175, 650 N.Y.S.2d 402 (1996).....	18, 19, 21, 22
<u>Braesch v. DePasquale</u> , 200 Neb. 726, 265 N.W.2d 842, 846 (1978).....	27
<u>Burgess v. Porterfield</u> , 196 W.Va. 178, 469 S.E.2d 114 (1996).....	6
<u>Burks v. McNeel</u> , 164 W.Va. 654, 264 S.E.2d 651 (1980).....	7
<u>Cape v. Tennessee Secondary School Athletic Association</u> , 563 F.2d 793, 795 (6th Cir. 1977) .....	27

<u>Cf. Jordan v. O'Fallon Township High School District No. 203 Board of Education,</u>	
302 Ill.App.3d 1070, 706 N.E.2d 137, 140 (1999).....	21
<u>Chevron U.S., Inc. v. National Resources Defense Counsel, Inc.,</u>	
467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).....	25
<u>City of Parkersburg v. Carpenter,</u>	
203 W.Va. 242, 507 S.E.2d 120 (1998).....	6
<u>Crandall v. North Dakota High School Activities Association,</u>	
261 N.W.2d 921, 926 (N.D. 1978) .....	27
<u>Dale Patrick D. v. Victoria Diane D.,</u>	
203 W.Va. 438, 508 S.E.2d 375 (1998).....	6
<u>Darlington v. Mangum,</u>	
192 W.Va. 112, 450 S.E.2d 809 (1994).....	13
<u>Hamilton v. Secondary Schools Activities Commission,</u>	
36 S.E.2d 656 (W.Va. 1989). .....	22, 23, 24
<u>Hebert v. Ventetuolo,</u>	
480 A.2d 403, 407, 19 Ed. Law Rep. 599 (R.I. 1984) .....	27
<u>In re United States ex rel. Missouri State High School Activities Association,</u>	
682 F.2d 147, 152-53 (8th Cir. 1982) .....	26, 27
<u>Janasiewicz v. Board of Education of Kanawha County,</u>	
299 S.E.2d at 34, 171 W.Va. 423 (1982) .....	14, 15, 16
<u>Jones v. Oklahoma Secondary School Activities Association,</u>	
453 F.Supp. 150, 155 (W.D. Okla. 1977) .....	27
<u>Kings Daughter Housing, Inc. v. Paige,</u>	
203 W.Va. 74, 506 S.E.2d 329 (1998) .....	12

<u>Kubiszyn v. Alabama High School Athletic Association,</u>	
374 So.2d 256, 257 (Ala. 1979) .....	27
<u>Liggett,</u>	
223 Kan. [610] at 614, 576 P. 2d 221 [(1978)] .....	26
<u>Martin v. Randolph County Board of Education,</u>	
195 W.Va. 297, 465 S.E.2d 399, 413 n. 10 (1995). .....	13
<u>McNatt v. Frazier School District,</u>	
C/A No. 95-0366 (W.D. Pa., unpublished decision entered	
March 27, 1995. ....	20, 22, 22, 28
<u>Pocahontas Mining Co. Limited Partnership,</u>	
202 W.Va. 169, 503 S.E.2d 258 (1998) .....	7
<u>School District of the City of Harrisburg v. Pennsylvania</u>	
<u>Interscholastic Athletic Association,</u>	
453 A.2d 445, 309 A.2d 353, 357-58 (1973). .....	27
<u>Shelton v. NCAA,</u>	
538 F.2d 1197, 1198 (9th Cir. 1976). .....	27
<u>State ex rel. Cooper v. Board of Education of Summers County,</u>	
197 W.Va. 668, 478 S.E.2d 341 (1996). .....	15, 16
<u>State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court,</u>	
240 Ind. 114, 162 N.E.2d 250, 255 (Ind. 1959). .....	27, 28
<u>State ex rel. Miller v. Reed,</u>	
W.Va. -, 510 S.E.2d 507 (1998) (No. 25191, 25146) .....	7
<u>State ex rel. Ohio High School Athletic Association v. Judges of the Court of</u>	
<u>Common Pleas of Stark County,</u>	
173 Ohio St. 239, 181 N.E.2d 261 (1962) .....	27

<u>Stone v. Kansas State High School Activities Association, Inc.,</u> 13 Kan.App.2d 71, 761 P.2d 1255, 1259-60 (1988).	26
<u>Swanson v. Guthrie Independent School District No. 1-1,</u> 942 F.Supp. 511 (W.D. Okla. 1996).	19

**CONSTITUTIONS:**

W.Va. Const. art. III, § 10	8
W.Va. Const. art XII, § 1	19

**STATUTES:**

W.Va. Code 18-2-5	25
West Virginia Code § 18-2-25 [1967].	23, 25
W.Va. Code § 18-5-13(6)(a)	15
W.Va. Code § 18-8-1 <u>Exemption B</u> (b)(4),	17
West Virginia Code § 18-8-1(c)(3).	3, 4, 8, 9, 10, 13
W.Va. Code § 18-9A-9(1).	17

## PROCEDURAL HISTORY

In September of 2002, the parents of Aaron Jones, an 11 year old "home schooled student", as defined by West Virginia State Code § 18-8-1(c)(3), contacted Mike Hayden, Executive Secretary of the WVSSAC to request that Aaron be permitted to compete on the Mannington Middle School wrestling team during the 2002-2003 season. However, Mr. and Mrs. Jones were advised that as a "home schooled student", Aaron was ineligible to participate, pursuant to WVSSAC Rules § 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."

On December 9, 2002 Counsel for the Respondents faxed the Petitioners a copy of the Complaint and Motion for Temporary Restraining Order and Preliminary Injunction, together with a note indicating their intent to file the same the following day—December 10, 2002.

During the afternoon of December 12, 2002, Counsel for the Respondents faxed a NOTICE OF HEARING advising the parties of a Preliminary Hearing to be held at 2 p.m. on December 13, 2002.

On December 13, 2002, The Honorable Judge Louis H. Bloom heard arguments from Counsel, and based on the Pleadings and the arguments of Counsel, entered a Preliminary Injunction permitting Aaron Jones to immediately begin participating on the Mannington Middle School wrestling team. At that time, Judge Bloom also established a briefing schedule and set the matter for Final Hearing on February 13, 2003.

On February 13, 2003 an evidentiary hearing was conducted before Judge Bloom. At the conclusion of the Hearing, Judge Bloom directed all parties to submit Proposed Findings of Fact and Conclusions of Law by March 14, 2003.

Thereafter, on September 23, 2003, Judge Bloom entered his DECISION AND FINAL ORDER, which ruled for the Plaintiffs on three grounds:

- “1. The defendants have breached their statutory duty under West Virginia Code § 18-8-1(c)(3) by failing to make an available educational resource available to Aaron;
2. The defendants have violated Aaron’s right to equal protection, as guaranteed by Article III, Section 10 of the West Virginia Constitution, because the blanket prohibition on home schooled students participating in interscholastic athletics fails the applicable rational basis test; and
3. The defendants have breached the duty to promulgate reasonable rules and regulations by implementing a total ban rather than crafting fair rules tailored to any legitimate concerns that may flow from allowing home schooled students, who are otherwise qualified, to participate on sports teams fielded by the public school they would be attending if they were not home schooled.”

A timely petition for appeal was then filed by the Petitioners on January 22, 2004 assigning error based on the three above listed conclusions of law found in Judge Bloom’s Order. On May 26, 2004, the West Virginia Supreme Court of Appeals issued an Order refusing said petition for appeal. On June 25, 2004, the Petitioners filed a motion to renew their petition for appeal which motion was subsequently granted by the West Virginia Supreme Court of Appeals on June 29, 2004.

## STATEMENT OF FACTS

Respondents, Daniel and Christy Jones, are residents of Marion County, West Virginia. Mr. and Mrs. Jones have four children. All of the Jones children who have attained school age receive home instruction from Mrs. Jones, including Aaron, who was 11-years old as of the time of the commencement of this action. If Aaron had been a public school student, he would have been a sixth grade student at Mannington Middle School in Marion County, West Virginia. However, he has been home schooled since the inception of his education at the age of six (6). Although Aaron's annual academic assessment was originally accomplished through portfolio review pursuant to § 18-8-1(c)(2)(D)(iii), for the past three years he has taken nationally normed standardized achievement tests and, despite decreasing scores, has managed to score at or above the fiftieth percentile. This test, however, is not the standardized achievement test currently taken by West Virginia's public school students.

In teaching her children, Mrs. Jones utilizes a structured Christian curriculum produced commercially by A Beka Book Company of Pensacola Christian College. The program includes testing in each subject area every nine weeks, and every nine weeks Mrs. Jones also generates a detailed progress report for each of her children. Mrs. Jones also maintains portfolios of each child's school work for the academic year. The Jones family has met all the statutory requirements for home schooling, including notifying the Marion County School Board of their intent to home school and submitting the requisite plan of instruction.

In the Spring of 2002, Aaron indicated to his parents his desire to participate on the Mannington Middle School wrestling team. Mr. and Mrs. Jones approached the school's

activities director and the school's wrestling coach, were referred to the WVSSAC, and were advised that the applicable rules limit participation to enrolled full-time students.

Mr. and Mrs. Jones contacted the Executive Secretary of the WVSSAC and requested that Aaron be allowed to participate on the Mannington Middle School wrestling team despite his home schooled status. On September 23, 2003 the Executive Secretary sent a letter to Mr. and Mrs. Jones explaining WVSSAC Rule §127-2-3.1, which restricts participation in interscholastic athletic activities to students enrolled on a full time basis in a WVSSAC member school. Similar responses were issued by Dave Stewart, State Superintendent of Schools, in his letter dated May 17, 2002 and by the Marion County Board of Education in their letter dated November 4, 2002.

Subsequently, Mr. and Mrs. Jones filed suit in the Circuit Court of Kanawha County.

### STANDARD OF REVIEW

With respect to conclusions of law and conclusions of fact, the standard of review of final judgments of the Circuit Court to be imposed by this Court is as follows:

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Syl. Pt., Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Syl. Pt. 1, Keith Allen A. v. Jennifer J.A., *supra*. See also Syl. pt. 1, Dale Patrick D. v. Victoria Diane D., 203 W.Va. 438, 508 S.E.2d 375 (1998); Syl. Pt. 1, City of Parkersburg v. Carpenter, 203 W.Va. 242, 507 S.E.2d 120 (1998)(same).

With respect to conclusions of law, the court further states:

"In reviewing the judgment of the lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syl. Pt. 1, Burks v. McNeel, 164 W.Va. 654, 264 S.E.2d 651 (1980).

Syl. Pt. 1, Keith Allen A. v. Jennifer J.A., 201 W.Va. 736, 500 S.E.2d 552 (1997). See also Syl. Pts. 4-5, State ex rel. Miller v. Reed, - W.Va. -, 510 S.E.2d 507 (1998) (No. 25191, 25146); Syl. Pt., Pocahontas Mining Co. Limited Partnership, 202 W.Va. 169, 503 S.E.2d 258 (1998)(same).

## SUMMARY OF ARGUMENTS

### I.

The Circuit Court of Kanawha County erred in finding that participation in interscholastic athletics is an available educational resource which, pursuant to West Virginia Code § 18-8-1(c)(3), must be available to home schooled students.

### II.

The Circuit Court of Kanawha County erred in determining that the rule promulgated by the state Board of Education limiting participation in interscholastic athletics to enrolled full-time students lacks a rational basis, and therefore is violative of the Equal protection Provisions in Article 3, § 10 of the West Virginia Constitution.

### III.

The Circuit Court of Kanawha County erred in determining that the rule promulgated by the state Board of Education which limits participation in interscholastic athletics to enrolled full-time students is an unreasonable regulation.

### IV.

The Circuit Court of Kanawha County should have given deference to the WVSSAC's promulgation of the rule limiting participation in interscholastic athletics to enrolled students under the principles of administrative law.

## ARGUMENT

### I.

#### **Participation in interscholastic athletics in not "an available educational resource" as that term is used in West Virginia Code § 18-8-1(c)(3).**

West Virginia Code § 18-8-1(c)(3) states, in pertinent part:

"The county 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 exercise the option to attend any class offered by the county board as the person or persons providing home instruction may consider appropriate subject to normal registration and attendance requirements.

In its DECISION AND FINAL ORDER the court below interprets this statute to require the Appellants to make interscholastic athletics available to home-schooled students. In making this determination he concludes that the legislature intended "assistance, including...available resources" to include participation in interscholastic athletics. He elaborates on this position in paragraphs 8, 9, and 10 of the portion of the DECISION AND FINAL ORDER entitled

Conclusions of Law:

"8. There is no dispute that participation in interscholastic athletics offers an individual student opportunities to learn important life lessons and expands the educational experience beyond the four walls of the traditional classroom. Therefore, it is arguable that the coaching and facilities that are available to student athletes could be considered an available educational resource within the meaning of the aforementioned statute."

"9. The view that coaching and facilities are an educational resource within the meaning of West Virginia Code §18-8-1(c)(3) is supported by the fact that, as the Plaintiffs correctly note, wrestling may provide Aaron with scholarship opportunities at the college level."

"10. The Defendants have breached their statutory duty on the above-quoted portion of West Virginia Code § 18-8-1(c)(3) by failing to make interscholastic sports available to Aaron."

Appellants find no error in the conclusion contained in paragraph 8 that participation in interscholastic athletics offers opportunities to learn life lessons "*beyond the four walls of the traditional classroom*". However, this statement does not necessarily support the proposition that participation in interscholastic athletics is an available educational resource. First of all, as a home schooled student, Aaron, or his parents on his behalf, have chosen to forego the *traditional classroom*. If, as the judge points out, interscholastic athletics are an expansion of the experiences in the classroom it seems illogical to conclude that the statute is designed to allow those that choose not to take advantage of the traditional classroom be allowed to participate. Secondly, it does not logically follow that because interscholastic athletics provide opportunities to learn life lessons it is necessarily an educational resource. Many different activities provide life lessons that we do not consider an educational resource. In fact, if the requirement that an activity provide life lessons is the only criteria for it to become an educational resource, this decision would be much more far reaching than interscholastic activities. For example, it is clear that clubs and honor societies provide life lessons, however, letting home schooled students enroll could cause chaos. According to William Walton, Principal of South Charleston High School:

"...Who is to say that a home schooled person gives that person all straight As and then wants to be the valedictorian of our class. I can see our honor societies.

"What we call Beta Epsilon. I can see it being affected by one person or two people or a group of people, whomever they are not having what we call content standards which is accepted by our State Department of Education.

"I can see them coming and stating, well, my child has a 4.0 based upon my decision. So therefore, I want my child in the National Honor Society.

"I want my child in Beta Epsilon. I am concerned that not only through athletics, but I am also concerned about my academic program that we have at South Charleston High." Hearing Transcript, Page 216.

Furthermore, paragraph 9 of the Conclusions of Law, which indicates that home schooled student's scholarship opportunities are negatively impacted by his not being allowed to participate in interscholastic athletics, is flawed in several ways. First, the Court does not take into consideration the fact that the NCAA has specific policies that relate to the eligibility of home schooled students to receive athletic scholarships, including changes implemented in early 2004 which recognized home schooled students as high school graduates, eliminating the "waiver process", thereby putting them on equal footing with traditional high school graduates in terms of the application process. Secondly, even if ineligibility negatively affects the chances of an athletic scholarship, it does not logically follow that participation in an available educational resource under the meaning of the statute. Participation has nothing to do with overall scholarship chances, particularly academic scholarship opportunities and scholarship opportunities based on participation in civic organizations, such as scouting, beyond the public school arena.

The scholarship opportunity argument is further flawed by the fact that athletics is not unconditionally offered to all public students equally. First of all, there are eligibility requirements

that public school students must meet. While all public school students *in schools that have a particular athletic program* are allowed to "try out", they can't all be on a team. If participation in interscholastic athletics was truly an available educational resource simply because it may lead to scholarship opportunities, it seems that the interpretation of the statute that the court below advances would require that all students, public and non-public, be allowed to participate in interscholastic athletics because of the slim chance that they may receive a athletic performance based scholarship. In addition, as Appellants have discussed in relation to athletics as a learning experience, many academic and public school based clubs offer scholarships to their participants as well. This, again, leads to the concerns of fairness in the face of differing academic standards, as discussed by Principal Walton.

Appellants also find error in this portion of the decision on several, more fundamental levels relating to the fact that the Court's interpretation does not coincide with the plain reading of the statute. Kings Daughter Housing, Inc. v. Paige, 203 W.Va. 74, 506 S.E.2d 329 (1998) at syllabus Pt. 2 states that "[I]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." It seems illogical to conclude that had the Legislature intended to require that home schooled students be allowed to participate on public schools sports team, it would have let such a significant proposition depend upon the variation of the meaning of "assistance" adopted by Circuit Court Judge Bloom. The stated purpose of the assistance required by this statute is to help the person or persons *providing* instruction. This makes sense in light of the listed example of text books. It does not seem to provide assistance to Aaron's mother in her capacity as his instructor, however, to allow him to

participate in the Mannington Middle School wrestling team. The language of W.Va. Code § 18-8-1(c)(3) is clearly limited to requiring assistance in the form of instructional materials.

Furthermore, to attempt to read the word "resource" to encompass a school's interscholastic athletic program is to twist the words of the statute out of shape and out of context. The noun "resource" appears in the statute in the plural form at the end of a list that contains the words "such assistance, including, textbooks, other teaching materials, and available resources, as may assist [the home school provider]...." W.Va. Code § 18-8-1(c)(3). It is appropriate to consider this list of items of a piece; that is, "[i]t is a fundamental rule of construction that, in accordance with the maxim noscitur a sociis, the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated." Syl. pt. 1, Darlington v. Mangum, 192 W.Va. 112, 450 S.E.2d 809 (1994). In other words, this doctrine " 'holds that a word is known by the company it keeps[.]' " Banker v. Banker, 196 W.Va. 535, 474 S.E.2d 465, 475 (1996), quoting Martin v. Randolph County Board of Education, 195 W.Va. 297, 465 S.E.2d 399, 413 n. 10 (1995). It follows in turn that "[t]he fact that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." Id.

Application of these principles to the statutory language West Virginia Code §18-8-1(c)(3) demonstrates that the "assistance" in the legislation "include[s]" only tangible teaching materials like "textbooks [and] other teaching materials[.]" Because the phrase "available resources" follows an enumeration of typical classroom materials, the doctrine noscitur a sociis suggests that the phrase "available resources" is meant to describe classroom materials as a classification -- and nothing more. It would wrench the statutory words out of context to assume that a listing that had heretofore been limited to books and other teaching materials was at the end of the list expanded to

include the whole of interscholastic athletic competition.

Additionally, language further along in the statute serves to buttress Appellant's reading of the legislation. These "textbooks, other teaching materials, and available resources" are to be given to home-school providers "subject to their availability." One can imagine "textbooks [and] other teaching materials" being "subject to their availability;" depending on supply, i.e., under-supply or over-supply, some extra instructional materials might be left over after the students had been given their books and materials. These "resources" then would be offered in the form of "assistance" as "available resources" to home school providers. It makes no sense, logically, grammatically, or semantically, to suggest that interscholastic athletic teams could be "subject to their availability;" the phrase speaks most logically of the existence of tangible goods to be distributed, not athletic teams to be joined.

## II.

**The rule promulgated by the state Board of Education which limits participation in interscholastic athletics to students enrolled in public schools has a rational basis.**

The court below, in quoting Bailey v. Truby, 174 W.Va. 8, 321 S.E.2d 302 (1984), correctly concluded that the right at issue in this case, specifically the right to play interscholastic athletics, does not rise to the level of being a fundamental or Constitutional Right. Furthermore, the Circuit Court correctly determined that this case should be analyzed under the rational basis test. In Janasiewicz v. Board of Education of Kanawha County, 299 S.E.2d at 34, 171 W.Va. 423 (1982), for example, the Court considered the differing treatment meted out to public and parochial students in regard to school transportation. The school board gave parents of such

children "full monetary stipends" for school transportation; in addition, they were allowed to ride regularly scheduled public school bus routes. Id. at 35. The plaintiff parents of the parochial students charged that treating their children differently from public school students violated equal protection in light of the statutory provision in W.Va. Code § 18-5-13(6)(a) that "allows a county school board to provide bus transportation to sectarian school students." Janasiewicz, 299 S.E.2d at 35.

The Court held that providing stipends plus allowing ridership on regular school bus routes, even though public school students were themselves given full bus ride privileges, did not violate equal protection. All that was required was "adequate means;" thus the Court found "that a full monetary stipend and permission to ride school buses on regularly scheduled bus routes is constitutionally 'adequate means' for public or nonpublic school students." Id. at 38. Even though free education is a constitutionally guaranteed right in West Virginia, treating public and non-public students differently with respect to school transportation gives rise to no constitutional problems. As the Circuit Court in Gallery found in commenting on Janasiewicz, "[s]ince the Plaintiff chose to opt out of the public school system he is a nonpublic student as envisioned by this case" (Final Order, Conclusions of Law, p. 7). Thus, the identical principles applied to public school and parochial school students regarding school bus transportation in Janasiewicz apply with equal force to the treatment of public school and home-schooled children with respect to participation in interscholastic athletics.

Even more to the point is the Court's later decision in State ex rel. Cooper v. Board of Education of Summers County, 197 W.Va. 668, 478 S.E.2d 341 (1996). In Cooper, the school board for financial reasons had eliminated school bus aid to parochial students studying in an

adjacent county. The parents argued that, in light of Janasiewicz, the school board "must either continue the bus transportation to Monroe County or provide [the student] with a transportation stipend." State ex rel. Cooper v. Board of Education of Summers County, 478 S.E.2d at 345-46.

The Court disagreed; this was not at all, in its view, what Janasiewicz had held:

"The Petitioner wishes to extend Janasiewicz further than we intended it to journey. Janasiewicz does not obligate a county school board to provide school bus transportation or stipends for parochial school students. Janasiewicz merely holds that if such a service is provided, it must be done adequately. We, therefore, decline the invitation to extend Janasiewicz beyond its narrow holding." State ex rel. Cooper v. Board of Education of Summers County, *supra*, 478 S.E.2d at 346.

Cooper is squarely on point; the distinction drawn by Cooper (and Janasiewicz before it) is between public and non-public education, not between public and parochial education. Even if a school board provides an interscholastic athletic program for public school students, Cooper establishes the proposition that it need not do so for non-public students. Cooper uncompromisingly holds that a school board need not provide a resource to the non-public student at all; it holds simply that the resource, if the school board chooses to provide it, must be provided "adequately." State ex rel. Cooper v. Board of Education of Summers County, *supra*, 478 S.E.2d at 346. Here, as expressed in WVSSAC Rule 127-2-3.1, the choice has been made not to extend participation in interscholastic athletics to non-students. Under Janasiewicz and Cooper, this decision simply does not violate equal protection in any way.

As a home schooled student, Aaron is excluded from participating on Marion Middle School wrestling team by WVSSAC Rule 127-2-3.1. There is a rational basis for such differing treatment of public or private school students and home-schooled students.

The Rule can be rationally justified on a number of grounds. These are summarized as follows:

1. The Rule promotes school spirit and cohesiveness, in that the athletes on its teams are students at the school.
2. To insure that academics take precedence over athletics. Although home-schooled children have their progress tested once a year, W.Va. Code § 18-8-1 Exemption B (b)(4), this yearly measurement is a much less satisfactory and accurate means of measuring a student's progress than the constant testing and frequent report cards given to public school pupils. In the public schools, frequent report cards and eligibility rules enable teachers and coaches to make sure that teams members are performing academically in a satisfactory manner. If they are not, they will not play. There can be no such certainty with home-school students; indeed, a parent might actually withdraw a student who is not doing well academically for home-schooling so as to allow him to participate in sports for which he would have been ineligible had he remained a public school pupil.
3. Athletic programs cost money. At the same time state aid is based on average daily attendance. See e.g., W.Va. Code § 18-9A-9(1) (Michie 1994 repl. vol. cum. supp. 1998). If non-students are allowed to participate on school teams, the school board will be expending money to support their participation without at the same time receiving state aid to support the activity.
4. The Rule allows school officials better to discipline athletic team members because they are public school students who are subject to day-to-day discipline. Home-school students can be disciplined, if at all, only in all-or-nothing terms, a fact which makes the disciplinary system unwieldy and ineffective.
5. Wholly apart from behavior and academic progress monitoring, the Rule also allows the school to ensure that its athletes are actually showing up for school so as to meet attendance requirements. No such monitoring would be possible for home-schooled athletes.

Despite these arguments, the court below found that "the draconian WVSSAC Rule § 127-2-3.1

fails to *rationally* further some legitimate purpose". Decision and Final Order, page 15 (emphasis by court).

The guarantee of a free public education under the West Virginia Constitution is furthered by Rule 127-2-3.1. Far from denying constitutional rights, the Rule actually promotes the fundamental right to education. The classification between public and home-schooled students that is embodied in Rule 127-2-3.1 therefore has a highly rational basis. Indeed, the appellants suggest that the Rule would also serve a compelling state interest for strict scrutiny purposes if, arguendo, that standard of review were applicable in this case. For those reasons, the judgment of the Circuit Court should be overturned.

Although Appellants are convinced that West Virginia decisions on equal protection questions applicable to this case mandate an reversal of the trial Court's Final Order, it is noteworthy that the identical issue has arisen in other jurisdictions. When the issue has been considered, the courts have upheld the exclusion from interscholastic athletics of home-schooled students. Even more to the point, the foreign courts deciding these cases have applied the rational basis test in reaching their conclusions.

In Bradstreet v. Sobol, 225 A.D.2d 175, 650 N.Y.S.2d 402 (1996), for example, the New York appellate division dismissed a parent's claim that her home-schooled child was eligible to participate in the local public school's interscholastic athletic program. The court first dispatched the parent's due process claim on the ground that "[a]s participation in interscholastic sports is merely an expectation and no fundamental right is involved, plaintiff's due process argument is

patently meritless." Id., 650 N.Y.S.2d at 403. The parent's equal protection argument fared no better in Bradstreet.

"We note that the challenged requirement does not create a classification based upon the status of plaintiff's daughter as a home-schooled student, but rather, the classification is based upon her lack of enrollment in the public school where she seeks to participate in the interscholastic sports program, a classification which clearly includes the students, such as those who attend private or parochial schools. We see nothing irrational in requiring that a student be enrolled in a public school in order for the student to participate in the school's interscholastic sports program." Id. at 404. (Emphasis supplied).

The Bradstreet court's holding should apply with equal force to the case at hand.

Bradstreet tracks the rationale underlying WVSSAC Rule 127-2-3.1 with notable fidelity. The classification inherent in the Rule is between students enrolled and in good standing at a public school that sponsors an interscholastic athletic program, and students who are not enrolled in such a school. The Rule applies indiscriminately among public, private, parochial, and home-schooled students. Bradford therefore supports the affirmation of the result below.

A similar result, albeit in a non-athletic context, was reached in Swanson v. Guthrie Independent School District No. 1-1, 942 F.Supp. 511 (W.D. Okla. 1996). There, the home-schooling parents sought permission to have their daughter participate in a public school program on a part-time basis. The school board denied the request; what is more, it adopted a policy requiring all students to be enrolled on a full-time basis. The rationale for this policy was the fact that in Oklahoma, as in West Virginia, much state aid is based on full-time daily attendance.

In response the parents invoked a state constitutional provision that is similar to W.Va. Const., art XII, § 1; they claimed that the policy was unconstitutional in the face of that provision. The court acknowledged the parents' right under the law to home-school their child; however, the

court concluded that the parents did not have a right, constitutional or otherwise, to use the public schools to augment their choice to educate their child at home. As a result the school board policy was unobjectionable:

“Plaintiffs have failed to provide any evidence that defendants have deprived Annie of her right to a free public education. Annie has always been and continues to be entitled to a free public education.”  
942 F.Supp. at 515.

Aaron has likewise been entitled at all times to a free public education. What Aaron is not entitled to do, under both state and federal constitutional law, is to take part in interscholastic athletics while remaining a home-schooled pupil in all other respects.

An identical result, once again in the home-school/interscholastic athletics context, was reached in McNatt v. Frazier School District, C/A No. 95-0366 (W.D. Pa., unpublished decision entered March 27, 1995 a copy of which is attached hereto as Appendix A). The parents charged that the school district's policy of forbidding the participation in interscholastic athletics of home-schooled children violated the equal protection rights of those children. Id. at 2.

The court noted that "a different treatment of classes of persons drawn by a governmental body is valid and will be upheld if the classification is rationally related to a legitimate state interest." Id. at 4. The court acknowledged that policies which "classif[y] by race, alienage, national origin or infringe upon a fundamental constitutional right . . . must pass heightened strict scrutiny." Id. at 4-5. Likewise, a policy which "classifies by gender or illegitimacy . . . must pass intermediate scrutiny." Id. at 5.

The classification before the court, however, was not of either type:

“Neither exception to the rational relationship test applies to this case, however. First, the policy does not classify students by race,

sex, illegitimacy, alienage or national origin. Nor is there any other factual basis to conclude that home educated students qualify as a suspect or quasi suspect class. Second, the policy does not infringe upon fundamental rights assured by the Constitution. The right to participate in extracurricular athletic activities is not a fundamental right guaranteed by the Constitution. To the extent that the plaintiff argues that a fundamental right is infringed by this policy, it enjoys no support in the law." *Id.* at 5(emphasis supplied).

Observing that "it is not for the Court to judge the wisdom, fairness, or logic of the school's policy," the court announced that it "need only determine whether the school district's policy bears a rational relationship to a legitimate state interest. *Id.* Such a relationship was found to exist; it was the school district's goal "to maintain the integrity of the interscholastic sports program." *Id.* at 6. If a particular athlete was not an enrolled student, it would be difficult if not impossible to gauge either his academic progress for eligibility purposes, *Id.* at 6-7, or his satisfaction of school attendance requirements. *Id.* at 7-8. In short, "[t]he policy is reasonably related to advance that . . . interest, because due to the nature of the home education program, it would be difficult, if not impossible, to monitor, with accuracy, whether home educated students have met the same scholastic requirements necessary to participate in the team." *Id.* at 8. As a result the policy did not violate the Equal Protection clause." *Id.* at 9.

McNatt (along with Bradstreet and Sobol) therefore supports the view that WVSSAC Rule 127-2-3.1 is only subject to a rational relationship test; by no means does a home-schooled student like Aaron occupy a suspect or quasi-suspect class. Nor is the right to participate in interscholastic athletics a fundamental right that is guaranteed under the state or federal constitution. Cf. Jordan v. O'Fallon Township High School District No. 203 Board of Education, 302 Ill.App.3d 1070, 706 N.E.2d 137, 140 (1999)("Students can need, want, and expect to participate in interscholastic

athletics, but students are not entitled to participate in them . . . playing high school football is a privilege rather than a right . . . participation in interscholastic athletics does not rise to the level of a protected interest;" Emphasis by the court). Angstadt v. Mid-West School District, 286 F. Supp. 2d. 436 (M.D. Penn. 2003)("We agree that there is no constitutionally protected interest in playing sports...The issue of whether there is a constitutionally protected interest in playing sports has not yet been considered by the Supreme Court. However, many courts that have considered the question have found that there I no clearly established right to compete or participate in extracurricular activities...Based on the above authority, we find that as a general proposition, there is no constitutionally protected right to participate in extracurricular activities.")

Finally, the Rule itself is neither unreasonable, arbitrary, nor capricious. On the contrary, it is rationally related to a number of legitimate educational goals, as the court below, the WVSSAC, and the courts in McNatt, Bradstreet, and Sobol have pointed out, and which this Brief of Appellees has already discussed. The only conclusion to be drawn is that WVSSAC Rule 127-2-3.1 does not offend equal protection; hence, the result below should be affirmed in this forum.

### III.

**The rule limiting participation in interscholastic athletics to enrolled students is a reasonable regulation, not in conflict with this Court's holding in Hamilton v. Secondary Schools Activities Commission, 386 S.E. 2d 656 (W.Va. 1989).**

In arguing that WVSSAC Rule 12-2-3.1 is not a reasonable rule, Plaintiff's rely upon Hamilton v. Secondary Schools Activities Commission, 36 S.E.2d 656 (W.Va. 1989). Furthermore, in finding for the plaintiff on this issue the Court as well relies upon Hamilton. It

requires little more than the briefest examination of Hamilton, however, to conclude that Hamilton has little to anything to do with this case.

Hamilton involved the refusal by the WVSSAC to allow a student to play interscholastic football during his senior year, essentially because he had flunked and then repeated ninth grade. WVSSAC Rule 127-2-5 in effect at that time limited a student to four consecutive seasons of eligibility beginning when he first entered the ninth grade. This meant that even though the student had not played football during his second ninth-grade year, he was nonetheless ineligible to play during his senior year. Id. at 657-58.

The Court disproved the Rule, finding its purpose was to prohibit "red-shirting" -- i.e. the act of "tak[ing] young athletes of star quality, hold[ing] them back in school for a year, keep[ing] them off the field, and hav[ing] them use that year to gain bulk, strength, and maturity," Id. at 658. The WVSSAC, in so constructing the rule was found to have "cast its net too wide, taking in those, like Chris Hamilton, who have just had a run of hard luck in the classroom." Id.

The Rule at issue in Hamilton was struck down for the following reasons:

"What makes the scheme unreasonable is the Commission's refusal to consider the circumstances surrounding a student's being held back. There is no inquiry into actual intent to red-shirt." Id.

Instead, a more limited rule tailored to its underlying purpose was judicially mandated.

"The legitimate purposes of the Commission's rules--to prevent red-shirting--may be accomplished in a more reasonable and less restrictive way. There must be some inquiry into the intent to red-shirt...The Commission's scheme, as applied to Mr. Hamilton, is not within the Commission's legitimate authority to promulgate "reasonable" regulations for school sports." Id. at 659, *quoting* West Virginia Code § 18-2-25 [1967].

In the portion of its opinion entitled CONCLUSIONS OF LAW the court below stated in paragraph 58:

"As in Hamilton, the WVSSAC 'has case its net too wide'. Hamilton, 386 S.E.2d at 658. The legitimate objectives of the WVSSAC could have been 'accomplished in a more reasonable and less restrictive way.' Hamilton, 386 S.E.2d at 659. Therefore the court must conclude that WVSSAC Rule 127-2-3.1 is not a reasonable regulation."

The appellants strenuously object to this usage of the Hamilton decision. Within the context of combating "red-shirting", intent was of paramount importance. By contract, intent has nothing whatever to do with the rationale behind WVSSAC Rule 127-2-3.1. The Rule is intended to all non-students from participating on a public school's interscholastic athletic teams. The question of why a particular student has chosen to pursue a non-public education is supremely irrelevant to the purpose of the Rule. The WVSSAC and the State Board of Education were not seeking to distinguish among home-schooled students on account of their motives for eschewing a free public education when they promulgated the Rule; rather they wanted to exclude all home-schooled students regardless of motive. Accordingly, the actual reason for a student's decision to be home-schooled has no bearing whatsoever on whether that student should be made subject to WVSSAC Rule 127-2-3.1, or not. The answer is that if Aaron is home-schooled, he is the object of the Rule. As the Circuit Court Judge in Gallery pointed out, "the goals underlying the promulgation of the Rule simply could not be served by examining the motives of home-schooled children who sought to participate in interscholastic athletics". As a result, the Appellees and the Trial Court have erred in their conclusion that Rule 127-2-3.1 offends the Hamilton decision.

#### IV.

**The rule limiting participation in interscholastic athletics to enrolled students should be upheld based on administrative law.**

The result below should be reversed in this Court as a function of administrative law.

Courts historically grant a high degree of deference to regulations promulgated by administrative bodies like the WVSSAC. See, e.g., Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424, 440 (1995). As the court stated in this regard:

"We believe that if the Legislature explicitly leaves a gap in legislation, then an agency has authority to fill the gap and the agency is entitled to deference on the question. Thus, an agency's interpretation will stand unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id., 466 S.E.2d at 440, quoting Chevron U.S., Inc. v. National Resources Defense Counsel, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

In the case at hand, the legislature specifically left a gap, which the WVSSAC was authorized to fill under the authority of W.Va. Code § 18-2-25. WVSSAC Rule 127-2-3.1 represents the fruits of that authority. As Appellants have previously demonstrated in this brief, the Rule in question is reasonable, constitutional, and faithful to the legislative grant under which it was promulgated. As a result both Appalachian Power and Chevron instruct that the Court accede to the expertise of the WVSSAC and the State Board of Education in promulgating the Rule in issue.

In addition, the nature of the rule-making power in this case mandates a particularly strong deference to the WVSSAC and the State Board of Education with respect to the Rule under examination. W.Va. Code 18-2-5 was enacted in 1968 to authorize county boards of education to delegate to the WVSSAC the control, supervision, and regulation of interscholastic athletic events and band activities. The principals of West Virginia's secondary schools adopt the WVSSAC rules

when they meet annually as the WVSSAC Board of Control. The proposed rules then become effective only upon approval by the West Virginia State Board of Education.

When rules that obviously are the product of such expertise, deliberation, and process reach the courts, a particularly great deal of deference is accorded them. Within the secondary school athletic context in particular, courts in many jurisdictions have enforced regulations which, if the court were writing on a clean slate they might have structured differently, but which, in light of their general reasonableness, the courts quite willingly enforce nonetheless.

A leading case of this sort was decided in Stone v. Kansas State High School Activities Association, Inc., 13 Kan.App.2d 71, 761 P.2d 1255, 1259-60 (1988), in which the constitutionality of eligibility rules promulgated by the KSHSAA was contested. The court accepted the wisdom of the Association in promulgating the rule, as follows:

“Although the trial court disagreed with the reasoning behind the no make-up rule, it is not the role of the trial court to substitute its own judgment for that of the KSHSAA. ‘Courts can no longer sit as a ‘super legislature’ and throw out laws they feel may be unwise, improvident or inappropriate.’ [State ex rel. Schneider v. Liggett, 223 Kan. [610] at 614, 576 P. 2d 221 [(1978)]]. If reasonable people can differ on the theory underlying the no make-up rule, a court may not hold that the rule is invalid under a rational basis standard.”

A similar holding was reached in Art Gaines Baseball Camp, Inc. v. Houston, 500 S.W.2d 735, 741 (Mo.Ct.App. 1973), 1973-2 Trade Cases P 74, 855 (Mo. App. Oct. 09, 1973), where the court stated that “[w]e cannot say that this rule is unreasonable and therefore we should not substitute our judgment for that of the Association.”

In general, under this theory courts in all jurisdictions defer to such associations and their rule-making power. A leading statement of this proposition was announced in In re United States

ex rel. Missouri State High School Activities Association, 682 F.2d 147, 152-53 (8th Cir. 1982), as

follows:

“Whether the rule is wise or creates undue individual hardship are policy decisions better left to legislative and administrative bodies. Schools themselves are by far the better agencies to devise rules and regulations governing extracurricular activities. Judicial intervention in school policy should always be reduced to a minimum.”

See also Hebert v. Ventetuolo, 480 A.2d 403, 407, 19 Ed. Law Rep. 599 (R.I. 1984); Kubiszyn v. Alabama High School Athletic Association, 374 So.2d 256, 257 (Ala. 1979); Crandall v. North Dakota High School Activities Association, 261 N.W.2d 921, 926 (N.D. 1978); Braesch v. DePasquale, 200 Neb. 726, 265 N.W.2d 842, 846 (1978) (“Rules governing the conduct of participation in interscholastic athletics duly and regularly adopted by the school officials ought to be valid and enforceable unless they are clearly arbitrary and unreasonable and serve no end of educational athletic policy”); Cape v. Tennessee Secondary School Athletic Association, 563 F.2d 793, 795 (6th Cir. 1977); Jones v. Oklahoma Secondary School Activities Association, 453 F.Supp. 150, 155 (W.D. Okla. 1977) (“[A]bsent a substantial deprivation of a constitutional right, such a policy decision is best left to the judgment of those who play, coach and administer interscholastic basketball, and not the federal court”); Shelton v. NCAA, 538 F.2d 1197, 1198 (9th Cir. 1976) (“[I]t is not judicial business to tell a voluntary association how best to formulate or enforce its rules”); School District of the City of Harrisburg v. Pennsylvania Interscholastic Athletic Association, 453 A.2d 445, 309 A.2d 353, 357-58 (1973); Syl. Pt. 2, State ex rel. Ohio High School Athletic Association v. Judges of the Court of Common Pleas of Stark County, 173 Ohio St. 239, 181 N.E.2d 261 (1962) (“The Ohio High School Athletic Association is an unincorporated association, and the decisions of the tribunals of such association with respect to its internal affairs will, in the

absence of mistake, fraud, collusion or arbitrariness, be accepted by the court as conclusive"); State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E.2d 250, 255 (Ind. 1959).

The Court should therefore follow this formidable body of precedent to find that the considered judgment of the WVSSAC and the State Board of Education as embodied in its Rule 127-2-3.1 is entitled to deference. Given that the Rule is free from substantive unreasonableness and constitutional infirmity, the Court should follow the rule that "it is not for the Court to judge the wisdom, fairness, or logic of the school's policy," McNatt v. Frazier School District, *supra* at 5, and overturn the Final Order entered in the court below.

#### CONCLUSION

For the reasons set out above, Appellants, The West Virginia Secondary School Activities Commission, the Executive Secretary of the West Virginia Secondary School Athletics Commission, and all other members of the West Virginia Secondary School Activities Commission, hereby respectfully request this Court to reverse the Final Order entered in the court below.

West Virginia Secondary Schools Activities Commission

By Counsel



WILLIAM R. WOOTON  
WV State Bar ID No. 4139  
THE WOOTON LAW FIRM  
PO Box 2600  
Beckley, WV 25802-2600

IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston

DANIEL JONES AND CHRISTY JONES, )

Plaintiffs/Appellees, )

v. )

Appeal No.: 31785 & 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 )  
SCHOOL ACTIVITIES COMMISSION, )

Defendants/Appellants. )


CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing "Brief of Appellant" was served upon the following by United States mail, first class postage prepaid on the 9<sup>th</sup> day of August 2004:

Stephen R. Brooks, Esquire  
Peter D. DeMasters, Esquire  
Robert Coffield, Esquire  
Flaherty, Sensabaugh and Bonasso  
7000 Hampton Center, Suite 1  
Morgantown, West Virginia 26505

Randall Minor, Esquire  
West Virginia College of Law  
Appalachian Center for Law and Public Serv  
P.O. Box 6130  
Morgantown, WV 26506  
Attorney for Appellees

Barbara Allen, Esquire  
Barry Koerber, Esquire  
Office of the Attorney General  
State Capitol, Room 26-E  
Charleston, West Virginia 25305

  
\_\_\_\_\_  
William R. Wooton