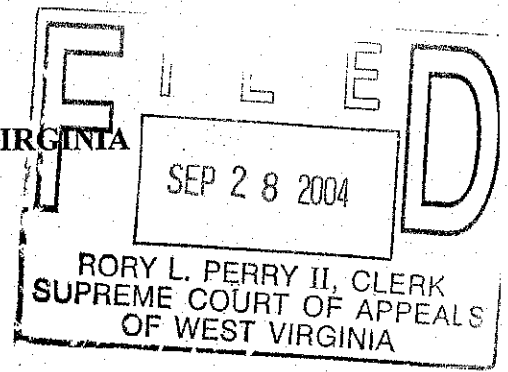
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DANIEL JONES and CHRISTIE JONES,

Plaintiffs Below/Appellees

vs.

Appeal Nos. 31785 & 31786
Circuit Court No. 02-MISC-477

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 Below/Appellants

APPELLEES' BRIEF

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PROCEDURAL HISTORY

Plaintiffs/Appellees Daniel and Christie Jones initiated this matter by complaint filed in the Kanawha County Circuit Court on December 10, 2002. The Jones filed their complaint on behalf of their 11 year old son, Aaron. The complaint named the West Virginia Board of Education ("State Board of Education"), State Superintendent David Stewart, the Marion County Board of Education, Marion County Superintendent Thomas Long, and the West Virginia Secondary School Activities Commission ("WVSSAC") as defendants. The Jones asked the Circuit Court to order Defendants/Appellants to permit Aaron to join the wrestling team at Mannington Middle School in Marion County.

After a hearing on December 13, 2004, Circuit Court Judge Louis Bloom issued a preliminary injunction which permitted Aaron to join and participate on the wrestling team in the same manner and subject to the same conditions as any other student member of the team while the case was pending.[1]

The matter came on for trial on February 13, 2003. Testifying for the Plaintiffs/Appellees were Daniel, Christie and Aaron Jones, Rick Rinehart, the wrestling coach at Mannington Middle School, and Mike Hayes, the activities director and also a coach at Mannington Middle School. Also testifying for Plaintiffs/Appellees were Linda Campbell, a certified teacher who conducts portfolio reviews for students in West Virginia, Mary Ellen Sullivan, a board member of the West Virginia Home Education Association who conducts and scores state approved standardized academic assessment tests for home schooled students, and Marianne Hughes whose home schooled children played in the band at Magnolia High School. Providing expert

[1]Circuit Court Preliminary Injunction at 3, R. at 115.

testimony for Plaintiffs/Appellees was Dr. Edwina Pendarvis, a faculty member at Marshall University who testified as an expert with respect to education, home schooling, academic assessment and her work with gifted and disabled children. Testifying for Defendants/Appellants were William Walton, the principal at South Charleston High School, Clinton Giles the principal at Capital High School, James Vickers, the principal at George Washington High School, and Mike Hayden, the executive director of the WVSSAC.

After hearing the evidence Judge Bloom took the matter under advisement. Judge Bloom issued his final decision on September 23, 2003. In his decision Judge Bloom found that the regulations of the State Board of Education and the WVSSAC effected a blanket prohibition on any participation by home schooled students in interscholastic athletics. The Circuit Court concluded:

> 1) the defendants have breached their statutory duty under W. Va. Code § 18-8-1(c)(3) 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 of the West Virginia Constitution, because the blanket prohibition on home schooled students participating in interscholastic athletics fails the rational basis test, and 3) the defendants have breach 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.[2]

The Circuit Court issued an injunction and writs of prohibition and mandamus directing Defendants/Appellants to refrain from applying their regulations so as to exclude home schooled students from participating in interscholastic athletics, and to permit Aaron Jones to try out for and compete on any sports team fielded by a public school he would otherwise attend if he were

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[2]Circuit Court Decision and Final Order at 24.

not being home schooled.[3]

The State Board of Education and the WVSSAC filed separate petitions for appeal on January 22, 2004. This Court unanimously denied those petitions on May 26, 2004. Appellants filed motions to renew the petitions on June 25, 2004. This Court by a 3-2 vote decided to hear the appeals on June 29, 2004. This Court granted leave to the West Virginia Education Association ("WVEA") and the West Virginia School Boards Association to file *amicus curiae* briefs by orders entered July 7, 2004 and July 20, 2004. By order entered August 24, 2004, this Court granted leave to the Marion County Board of Education to join in the Appellants' briefs.

STATEMENT OF FACTS

Appellees Daniel and Christie Jones are the parents of five children. They are long-term residents of Mannington, West Virginia. The Jones children have never lived anywhere else.[4]

The Jones home school each of their school age children, and they have done so since each child became subject to West Virginia's compulsory school attendance laws. The Jones' decision to home school their children was based upon a variety of reasons, including religious and moral concerns. In home schooling their children the Jones utilize a structured curriculum produced commercially by the A Beka Book Company of the Pensacola Christian College. The A Beka program includes books, lesson plans, work books and regular quizzes and tests which Christie Jones uses every 9 weeks to generate a detailed progress report for each child. Ms. Jones also maintains portfolios of each child's work for the academic year.[5]

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[3]*Id* at 25-26.

[4]Testimony of Christie Jones, Tr. at 8, R. at 521.

[5]Circuit Court Decision and Final Order, Findings of Fact, ¶¶ 11, 13 & 14.

The Jones' eldest child, Aaron, was 11 years old at the time of trial. If he were not home schooled he would have been in the 6th grade at Mannington Middle School in Marion County.[6]

In the Spring of 2002, Aaron informed his parents he would like to join the wrestling team at Mannington Middle School.[7] The preceding year Aaron had wrestled in the local PeeWee wrestling program, but due to his age and size that was no longer a viable option for him to continue wrestling.[8]

When the Jones approached the wrestling coach and activities director at Mannington Middle School about Aaron joining the team they were advised he would be welcome on the team subject to WVSSAC approval.[9]

The WVSSAC is a quasi-public body[10] to which county boards of education may delegate control, supervision and regulation of interscholastic athletic and band activities pursuant to W. Va. Code § 18-2-25. Each county board of education in West Virginia has delegated such authority to the WVSSAC.[11]

When the Jones contacted the WVSSAC they were told Aaron could not participate on

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[6]*Id* at ¶ 2.

[7]*Id* at ¶ 20.

[8]Testimony of Mannington Middle School Wrestling Coach Rick Rinehart, Tr. at 160-161, R. at 673-674.

[9]Circuit Court Decision and Final Order, Findings of Fact, ¶ 21.

[10]*See Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 458 at N. 4, 388 S.E.2d 480, 484 at N. 4 (1989).

[11]*Id* at 456, 388 S.E.2d at 482.

the team because he was not enrolled at Mannington Middle School.[12] When the Jones sought to appeal that decision to the WVSSAC board of review they were informed they could not do so because their child was not attending a WVSSAC member school.[13] At that point the WVSSAC advised the Jones the only way Aaron could join the team was to stop home schooling and enroll full-time at Mannington Middle School.[14]

The Jones also contacted State Superintendent David Stewart about Aaron joining the wrestling team at Mannington Middle School. Mr. Stewart informed them that would not be possible citing the WVSSAC enrollment rule.[15]

The WVSSAC enrollment rule, found at WVCSR § 127-2-3.1, provides a student must be enrolled full-time in a member school in order to participate in WVSSAC sanctioned activities, including interscholastic athletics. The original purpose of the enrollment rule was to stop the practice in the early 20th century of recruiting adult athletes from the community to play on a school's team.[16] While Appellants concede that is not an issue in this case,[17] they contend the enrollment rule promotes school spirit, fosters their ability to maintain team discipline and

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[12]WVSSAC Letter to Daniel Jones, Plaintiffs' Ex. 4, R. at 250.

[13]*Id.*

[14]*Id.*

[15]State Superintendent David Stewart's Letter to Daniel Jones, Plaintiffs' Exhibit 3, R. at 249.

[16]Testimony of WVSSAC Executive Director Mike Hayden, Tr. at 312-314, R. at 825-827.

[17]Id at 314-315, R. at 827-828.

conserves financial resources.[18]

The WVSSAC's eligibility rules also establish academic standards for participation in WVSSAC sanctioned activities, including interscholastic athletics. A student must do passing work in the equivalent of 20 periods (4 subjects with full credit toward graduation) per week, and at least 2 of the subjects must be in different subject areas involving English-Language Arts, Social Studies, Mathematics, or Science.[19] Failure to earn passing marks in four full credit subjects during a semester shall render a student ineligible for the following semester;[20] however, the student's eligibility may be reinstated mid-semester if he or she is doing passing work at that time.[21]

The State Board of Education also has promulgated regulations related to school attendance and academic standards. Students who wish to participate in extracurricular activities must meet all State and local attendance requirements, which essentially means a full day prior to Grade 12 and at least 4 class periods per day in the 12th Grade.[22] Students also are required to maintain an overall 2.0 GPA.[23]

While neither the WVSSAC or the State Superintendent referenced the academic standards portion of their rules in denying Aaron's request to join the wrestling team, in these

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[18]W. Va. Board of Education Brief at 15-19; WVSSAC Brief at 17.

[19]WVCSR § 127-2-6.1.

[20]*Id.*

[21]WVCSR § 127-2-6.1.5.

[22]WVCSR § 126-26-3.2.

[23]WVCSR § 126-26-3.1.

proceedings they have indicated the promotion of academic standards is a reason to bar home schooled students from participating in interscholastic athletics. *See* W. Va. Board of Education Brief at 13-15; WVSSAC Brief at 17.

The Jones filed suit in December 2002. Pursuant to the Circuit Court's preliminary injunction, Aaron Jones has been wrestling on the Mannington Middle School wrestling team for the past two seasons. By all accounts it has been a positive experience for all involved.[24] Since Judge Bloom issued his final decision other home schooled students have begun participating in interscholastic athletics around the state.

ISSUES PRESENTED

I. WHETHER THE CIRCUIT COURT CORRECTLY FOUND APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS DENIED THEM ACCESS TO AN AVAILABLE EDUCATIONAL RESOURCE IN VIOLATION OF W. VA. CODE § 18-8-1(c)(3)?

II. WHETHER THE CIRCUIT COURT CORRECTLY FOUND APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS WITHOUT REGARD FOR THEIR ACADEMIC PERFORMANCE OR OTHER CONDUCT VIOLATED APPELLANTS' OBLIGATION TO PROMULGATE REASONABLE RULES AND REGULATIONS?

III. WHETHER THE CIRCUIT COURT CORRECTLY FOUND APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS WITHOUT REGARD FOR THEIR ACADEMIC PERFORMANCE OR OTHER CONDUCT VIOLATED EQUAL PROTECTION PRINCIPLES?

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[24]Testimony of Rick Rinehart, Tr. at 159, R. at 672; Testimony of Mike Hayes, Tr. at 180-181, R. at 693-694; Testimony of Aaron Jones, Tr. at 212-213, R. at 725-726.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS DENIED THEM ACCESS TO AN AVAILABLE EDUCATIONAL RESOURCE IN VIOLATION OF W. VA. CODE § 18-8-1(c)(3).

A. EVERY CHILD IN WEST VIRGINIA ENJOYS AN EQUAL ENTITLEMENT TO THE BEST EDUCATION WE CAN REASONABLY PROVIDE.

The purpose behind West Virginia's education laws and system of free schools is to "assure that *all of our children have every opportunity* to secure an education which is thorough and is provided in an efficient manner." W. Va. Code § 18-1-4(a) (2003 Replacement Vol.) (emphasis added). A fundamental goal of our system is that "[a]ll students will have equal education opportunity." W. Va. Code § 18-1-4(b)(2).

In its own regulations the Department of Education acknowledges:

> Ensuring a quality education implies that a thorough and efficient education system exists that provides equal access to substantive curricular offerings and appropriate related services for all students. Providing such an education system must be the goal of the West Virginia Legislature; West Virginia Board of Education; West Virginia Department of Education; county boards of education; and the people of West Virginia. This policy provides the basic structure for all education programs and student support services necessary for a thorough and efficient system of education to be available to all students.

WVCSR § 126-42-3.2.

In *Bailey v. Truby*, 174 W. Va. 8, 321 S.E.2d 302 (1984) this Court held:

> The State Board of Education, charged with the general supervision of our state's educational system, has a duty to ensure that the constitutionally mandated educational goals of quality and equality are achieved.

174 W. Va. at 16, 321 S.E.2d at 310.

In keeping with the above, it is not surprising this Court recognized in *Gallery v. WVSSAC*, 205 W. Va. 364, 518 S.E.2d 368 (1999):

> [A] reading of W. Va. Code, 18-8-1 (1995) and 18-2-25 (1967) compels the conclusion that all of the participants in the educational endeavors of our state are involved in a complementary effort to further the goal that every one of our state's children–whether in parochial, private, public, home-based, or other educational programs–has access to the richest possible menu of educational and developmental experiences.

205 W. Va. at 367-68, 518 S.E.2d at 371-72.

B. HOME SCHOOLING IS A STATE SANCTIONED, SUPERVISED AND SUPPORTED PUBLIC EDUCATION ALTERNATIVE TO THE TRADITIONAL CLASSROOM.

West Virginia requires every child to attend school from ages 6 to 16. W. Va. Code § 18-8-1(a). West Virginia permits parents to satisfy the truancy laws by home schooling their children as an alternative to the traditional public school classroom. W. Va. Code § 18-8-1(c).

While being home schooled a child remains under the supervision of county school officials. Parents must provide the county superintendent or board of education with a notice of intent to home school, a plan of instruction, and an annual academic assessment of the child's progress. W. Va. Code § 18-8-1(c)(2). The county superintendent may seek a court order prohibiting home schooling upon a finding of educational neglect or other compelling reasons. *Id.*

In *State v. Riddle*, 168 W. Va. 429, 285 S.E.2d 359 (1981), this Court upheld the constitutionality of the home schooling statute, in part, based upon the State's interest in "having all children between ages of 7 and 16 somewhere within the supervision of the county boards of education." 168 W. Va. at 439, 285 S.E.2d at 364.

In keeping with its stated goals of affording all children every opportunity to secure an appropriate education, the Legislature appears to have envisioned home schooling as a partnership between the home schooling parents and local school officials when it enacted the

home schooling statute which provides:

> 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.

W. Va. Code § 18-8-1(c)(3).

C. INTERSCHOLASTIC ATHLETICS ARE A VALUABLE COMPONENT OF A THOROUGH AND EFFICIENT EDUCATION.

Every child in West Virginia has a fundamental right to a thorough and efficient education pursuant to Article XII, Section 1 of the West Virginia Constitution. In defining a thorough and efficient education this Court recognized in *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) that such an education "develops, as best the state of education allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship ...." 162 W. Va. at 705, 255 S.E.2d at 877.

In discussing the role played by athletics in education this Court noted in *Glover v. Simms*, 121 W. Va. 407, 3 S.E.2d 612 (1939):

> The physical welfare of young men and women cannot with propriety be ignored. Education is a proper function of state government and includes appropriate physical development as well as mental and moral.

121 W. Va. at 411, 3 S.E.2d at 614.

The West Virginia Attorney General has offered the opinion that:

> We believe that the physical education and training of school children of elementary and high school grades, including physical or gymnastic exercises, physical games, sports, and other similar co-curricular activities, form a proper part of a public school program. We are also inclined to adopt the view that extracurricular athletics and band activities are now generally recognized as a proper integral part of a contemporary educational program

> of the public schools. By Code § 18-2-25, the Legislature has officially sanctioned, as an element of the educational process, "interscholastic athletic events and other extracurricular activities" of the students in the public, private and parochial secondary schools of the State.

Opinion of the West Virginia Attorney General, January 7, 1980, at 17-18.

Everyone involved in the present case agrees that athletics serve a valuable role in the education of our state's children. *See* Testimony of Mike Hayden, Director WVSSAC, Tr. at 331-334, R. at 844-847. The National Federation of State High School Associations and its membership, which includes the WVSSAC, has stated:

> The National Federation of State High School Associations and its membership believe that interscholastic sports and fine arts activities promote citizenship and sportsmanship. They instill a sense of pride in community, teach lifelong lessons of teamwork and self-discipline and facilitate the physical and emotional development of our nation's youth .... They are not a diversion but rather an extension of a good educational program .... [Such] programs provide valuable lessons for practical situations–teamwork, sportsmanship, winning, losing, and hard work. Through participation in activity programs, students learn self-discipline, build qualities the public expects schools to produce in students so that they become responsible adults and productive citizens.

National Federation of State High School Associations , *The Case for High School Activities*, Plaintiffs' Exhibit 5 at pp.1-2, R. at 251-52.

Finally, it is worth noting that interscholastic athletics are funded, at least in part, with public funds provided by the tax payers of West Virginia, which include home schooling families. If interscholastic athletics are not a valuable component of our state's education system, why are we using scarce education dollars to support them?

D. BY DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS, APPELLANTS ARE UNREASONABLY WITHHOLDING AN AVAILABLE EDUCATION RESOURCE IN VIOLATION OF W. VA. CODE § 18-8-1(c)(3).

Appellees' claim under W. Va. Code § 18-8-1(c)(3) is premised upon the following:

1. The opportunity to participate in interscholastic athletics represents an educational resource that would assist home schooling parents in securing a quality education for their children.

2. There are no remotely comparable opportunities available whereby home schooled students might secure the educational opportunities and benefits offered by interscholastic athletics.

3. Appellants are denying home schooled students access to an education resource that already exists, that was paid for by the citizens of this state, including home schooling parents, and that easily could accommodate home schooled students.

No one can seriously dispute the educational benefits that interscholastic athletics represent for children, including home schooled students. While athletics may not be as important in the educational scheme as a math class or some other curricular or co-curricular activity, participation on an athletic team still represents a valuable educational opportunity.

Appellants can't have it both ways. On one hand they recognize sports are an integral part of education and extol the many virtues of having sports as part of an education program. On the other hand they urge this Court to find that sports programs do not represent an educational resource or something that would assist a home schooling parent in achieving the best education possible for his or her child. Those two positions are diametrically opposed.

No one in the present case has ever contended there are other opportunities available to home schooled students comparable to interscholastic athletics. Given their limited numbers and resources, it simply is unrealistic to believe that home schooled students could field their own athletic teams.

Nor is there any reason to believe it would be difficult for Appellants to incorporate home schooled students into their athletic teams. Home schooled students represent less than two percent (2%) of school-aged children in West Virginia. *See* Plaintiffs' Exhibits 13 & 14, R. at

pp. 299-315. As Mike Hayden, the Executive Director of the WVSSAC, stated in a recent newspaper article, "When push comes to shove, there won't be that many kids who will choose to play." Dave Hickman, *Home-School Decision Won't Have Major Impact*, Charleston Gazette, June 3, 2004, at 1B.

Other states permit home schooled students to participate on public school teams.[25]

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States Allowing Participation by Statute	Citation
Arizona	Arizona Revised Statutes Anno. § 15-802.01
Colorado	Colorado Revised Statutes Anno. § 22-33-104.5(6)
Florida	Florida Statutes Anno. § 232.425
Idaho	Idaho Code § 33-203
Iowa	Iowa Code Anno. §§ 256.46, 299A
Maine	Maine Revised Statutes Anno. Tit. 20-A, § 5021
Minnesota	Minnesota Statutes Anno. 123B.49, Subd. 4(a)
New Hampshire	New Hampshire Revised Statutes § 193A:2(II)
North Dakota	North Dakota Century Code § 15.1-23-16
Oregon	Oregon Revised Statutes § 339.460
South Dakota	South Dakota Codified Laws § 13-36-7
Vermont	Vermont Statutes Anno. 16 § 563(24)
Washington	Washington Revised Code § 28A.150.350
States Allowing Participation by Rule	**Citation**
Massachusetts	MIAA Handbook Rule 54
Nevada	NIAA G.2070
Pennsylvania	PIAA Handbook, Art. III, § 7
Rhode Island	RIIL Rule 3.1.I
Utah	State Board of Education Reg. R277-438-4
Wyoming	WHSAA Rules 2.6.4, 3.1.3, 6.2.91

If those states can incorporate home schooled students into their public school athletic programs, there is simply no reason to believe that West Virginia could not do the same.

Appellants urge this Court to interpret W. Va. Code § 18-8-1(c)(3) in a restrictive fashion. WVSSAC Brief at 12-14. But the statute speaks in terms of an obligation to provide "such assistance ... as may assist the person or persons providing home instruction, subject to their availability." The only limiting factor contemplated by the Legislature appears to be "availability." Moreover, the language "*including* textbooks, other teaching materials and available resources" (*emphasis added*), on its face, does not purport to be an exclusive list.

A restrictive interpretation also would fly in the face of the guiding principles that every West Virginia child will have every opportunity to secure a thorough and efficient education and educational opportunities will be equally available to all our children. W. Va. Code § 18-1-4.

Appellants also urge this Court to reject the Circuit Court's holding under W. Va. Code § 18-8-1(c)(3) because the lower court's decision is inconsistent with this Court's decision in *Bailey v. Truby*, 174 W. Va. 8, 321 S.E.2d 302 (1984). State Board of Education Brief at 9. *Bailey* stands for the proposition that the State Board of Education may enact academic standards for athletic participation in order to promote the goal of academic excellence. 174 W. Va. at 18, 321 S.E.2d at 313. But as discussed later in this brief, a policy that denies home schooled students any opportunity to participate without regard for their academic performance does not promote that goal.

Finally, Appellants raise the concern that the lower court's interpretation of W. Va. Code § 18-8-1(c)(3) will open the floodgates to similar claims by private school students. State Board

of Education Brief at 11. That argument ignores the fact that W. Va. Code § 18-8-1(c)(3), which simply sets out school officials' obligation to home schooled students, has nothing to do with private schools.

II. THE CIRCUIT COURT CORRECTLY FOUND APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS WITHOUT REGARD FOR THEIR ACADEMIC PERFORMANCE OR OTHER CONDUCT VIOLATED APPELLANTS' OBLIGATION TO PROMULGATE REASONABLE RULES AND REGULATIONS.

The Circuit Court found:

> [T]he 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.

Circuit Court Decision and Final Order at 24.

No one has ever disputed in the present case that the WVSSAC and the State Board of Education may promulgate reasonable rules related to a student's participation in interscholastic athletics. They are free to condition participation upon academic standards, residency requirements or other rules governing a student's conduct while participating on athletic teams. What makes Appellants' policies problematic in the present case is their total exclusion of a group of students based solely upon their home schooled status without regard to their academic performance, residency, or conduct. A home schooled child may, by any measure, be excelling academically, have lived his or her entire life in a school's service area, and be the most well-behaved child imaginable, and still have no opportunity to participate on an athletic team. That is unreasonable.

A. APPELLANTS' RULES AND REGULATIONS GOVERNING STUDENTS' PARTICIPATION IN INTERSCHOLASTIC ATHLETICS MUST BE REASONABLE.

The West Virginia Secondary School Activities Commission has been delegated authority regarding the control, supervision and regulation of interscholastic athletics pursuant to West Virginia Code § 18-2-25. In *Hamilton v. Secondary Schools Activities Commission,* 182 W. Va. 158, 386 S.E.2d 656 (1989) this Court held the rules and regulations promulgated by the WVSSAC must be reasonable. 182 W. Va. at 159 at N. 2, 386 S.E.2d at 657 at N. 2.

In exercising control, supervision and regulation over interscholastic athletics, county boards of education and the WVSSAC are subject to the ultimate authority of the West Virginia Board of Education. *State ex re. Lambert v. West Virginia State Board of Education*, 191 W. Va. 700, 709, 447 S.E.2d 901, 910 (1994); *Bailey v. Truby*, 174 W. Va. 8, 18, 321 S.E.2d 302, 312 (1984). In exercising its authority over interscholastic athletic events, the State Board of Education, like any public agency, has a duty to promulgate regulations that are not arbitrary or unreasonable. *Bailey, supra*, 174 W. Va. at 13, 321 S.E.2d at 308. *See also State ex rel White v. Parsons*, 199 W. Va. 1, 9, 483 S.E.2d 1, 9 (1996).

Any public body is limited by principles of fundamental fairness. *Parsons, supra*, 199 W. Va. at 8, 483 S.E.2d at 8. When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interest of the affected individual and genuinely account for the individualized effect of its proposed action. *Id* at 9, 483 S.E.2d at 9.

Appellant do not dispute they have an obligation to promulgate reasonable rules and

regulations. State Board of Education Brief at 22. Instead, Appellants contend that this Court's holding in *Hamilton v. Secondary Schools Activities Commission* has nothing to do with the present case. WVSSAC Brief at 24. In *Hamilton* this Court held that the WVSSAC's "red-shirting" rule was unreasonable because it was applied without any consideration to the individual reasons why a child was held back in a given year. 182 W. Va. at 160, 386 S.E.2d at 658. Appellants argue that the reasons why a family may choose to home school their child are irrelevant to the WVSSAC and State Board of Education, "rather they wanted to exclude all home schooled students regardless of motive." WVSSAC Brief at 24. But that is Appellees' point in the present case. A blanket prohibition that denies a group of students any opportunity to participate regardless of their individual academic performance or conduct is over-broad and serves no legitimate purpose. That is what makes it unreasonable.

Appellants also contend their policies are reasonable because they promote academic standards, school spirit and discipline, and because they preserve scarce financial resources. W. Va. Board of Education Brief at 24-25; WVSSAC Brief at 17. Appellees will discuss in the following sections why a blanket ban against home schooled students' participation does not promote these goals.

B. DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS DOES NOT PROMOTE ACADEMIC GOALS FOR EITHER ENROLLED STUDENTS OR HOME SCHOOLED STUDENTS.

Appellants' rules establishing academic standards for athletic participation were designed to promote academic excellence. *See Bailey v. Truby*, *supra*, 174 W. Va. at 18, 321 S.E.2d at 313. It was believed conditioning athletic participation upon academic performance would

motivate students to make greater efforts in the classroom. This Court in *Bailey* recognized that was a legitimate choice made in the exercise of oversight authority by the State Board of Education. *Id.*

It is worth noting at the outset that the State and school officials' interest in the academic performance of enrolled students is different from the interest with respect to home schooled students. School officials are vitally concerned with the academic progress of enrolled students because those students attend their schools and therefore are their responsibility. As such, school officials are free to adopt the books, curriculum, testing, and athletic eligibility guidelines they believe works best for their enrolled students. Conversely, home schooled students primarily are the responsibility of their parents who choose the curriculum and methodologies they believe works best for their children. The State's interest in a home schooled student's academic performance is defined by the home schooling statute found at W. Va. Code § 18-8-1. So long as a home schooled student is in good standing with the statute, the State's interest is satisfied. The fact that a home schooling family may utilize a different curriculum or test from the public schools is perfectly appropriate under the home schooling statute, and that in no way interferes with the choices school officials make for their students. Moreover, the above systems appears to work very well for home schooled students who statistically outperform their public and private school counterparts on tests measuring academic performance. Testimony of Edwina Pendarvis, Ph.D., Tr. at 56, R. at 569.

Requiring Appellants to make a reasonable accommodation in their regulations for home schooled students in no way limits their ability to continue to apply academic requirements for enrolled students. Appellees have never sought to invalidate the regulations with respect to

enrolled students.

Extending an opportunity for participation to home schooling students would provide home schooling parents with a comparable tool for encouraging greater academic effort by their charges. In that regard, Christie Jones testified that Aaron's academic efforts increased after he began wrestling because he knew he would not be permitted to continue wrestling if his school work began to suffer. Testimony of Christie Jones, Tr. at 21-22, R. at 534-35.

Appellants argue it is unfair that two students on the same team, one enrolled and one home schooled, should be subject to different curriculums and grading for purposes of determining eligibility. State Board of Education Brief at 14-15, 24-25. That argument ignores the differences that currently exist among enrolled student athletes. For example there are students playing now whose eligibility is determined on the basis of more rigorous Advanced Placement courses as opposed to Vocational Technical courses taken by other students. There are other students whose eligibility is determined based upon pass/fail courses[26] or simply upon compliance with his or her Individualized Education Plan[27] as opposed to a letter grade. Other student athletes are now free to take courses over the Internet,[28] which may be the very same courses being taken by a home schooled student. If Appellants' policies can accommodate all those different kinds of student athletes, surely they can also accommodate home schooled students.

There are any number of ways that home schooled students' academic eligibility could be

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[26]WVCSR § 126-26-3.1(c).

[27]WVCSR § 126-26-3.1(g).

[28]WVCSR § 126-48-1, *et seq.*

evaluated in a fair and objective fashion.

Aaron Jones' family utilizes a highly structured curriculum that includes homework assignments, and regular quizzes and tests. Testimony of Christie Jones, Tr. at 12-15, R. at 525-528. Aaron receives a report card that is more detailed than an enrolled student receives. Plaintiffs' Exhibits 1 & 2, R. at 239-248. It would be an easy matter to determine his grades and overall GPA. Appellants question whether parents can be objective graders, but other states are willing to trust parents in that regard.[29] Appellants' distrust of parents also ignores the uniquely vested interest parents have in their child's academic progress.

If a home schooling family utilizes a less structured curriculum, it is possible to assign a home schooled student's work a letter grade through a portfolio review, which is an approved method for evaluating home schooled students' academic performance pursuant to W. Va. Code § 18-8-1(c)(2)(D)(iii). During a portfolio review a certified teacher reviews and assesses the body of a student's work in various subjects studied over a defined period. Testimony of Edwina Pendarvis, Ph. D., Tr. at 57; Testimony of Linda Campbell, Tr. at 132-134, R. at 645-647. Ms. Campbell, a certified teacher who regularly performs portfolio reviews, testified she has utilized a portfolio review in the past to generate a transcript for a home schooled student which was accepted by one school to establish the student's athletic eligibility. *Id* at 135-137, R. at 648-650. There is no reason that couldn't be done for any home schooled child, and portfolio reviews

[29]Arizona Revised Statutes Anno. § 15-802.01("The individual providing the primary instruction of a child who is instructed at home shall submit written verification that provides ... [w]hether the student is receiving a passing grade in each course or subject being taught."); *see also* [Rhode Island] RIIL Rule 3.1.I(2); Code of Vermont Rules 22-000-009, § 4404.3(c).

are accepted in other states to establish home schooled students' eligibility.[30]

Appellants also could condition a home schooled students athletic participation upon the student scoring above a certain percentile on a nationally normed standardized academic achievement test.[31] A number of states have adopted this approach for establishing eligibility for home schooled students.[32]

Finally, Appellants raise the specter of the failing student whose parents might opt to home school for the sole purpose of maintaining the child's athletic eligibility. State Board of Education Brief at 15; WVSSAC Brief at 17. That argument fails to appreciate the financial and time commitment involved on parents' part in choosing to home school their children. It is a slap

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[30]Oregon Revised Statutes § 339.460(1)(b)(B) ("a requirement that a student submit a portfolio of work samples to a school district for review to determine whether a student is eligible to participate in interscholastic activities."); *see also* Florida Statutes Anno. § 232.425(3)(c)(2).

[31]To be in good standing a home schooled student is expected to score above the 50th percentile on state approved standardized academic achievement test. W. Va. Code § 18-8-1(c)(2)(D)(i). Conditioning eligibility on a score above the 50th percentile actually would appear to represent a more rigorous standard than Appellants' current academic standards. The activities director at Mannington Middle School testified that roughly 20-25% of students at Mannington Middle School fail to meet the Appellants' academic standards rules. Testimony of Mike Hayes, Tr. at 186, R. at 699. The Principal at South Charleston High School testified that only 2% of their students failed to qualify for sports participation. Testimony of William Cameron Watson, Tr. at 243, R. at 756. Forty-seven percent (47%) of the students at Mannington Middle School failed to score above the 50th percentile on the annual standardized academic assessment test. Plaintiffs' Exhibit 9, R. at 268. Statewide, 42% of public school students fell below the 50th percentile on the test. *Id.*

[32]Idaho Code § 33-203(4) ("student shall achieve a minimum score on the achievement test required annually by the state board of education, and the score shall be used to determine eligibility for the following year. The student shall be eligible if the minimum composite score places the student within the average or higher than average range as established by the test service utilized."); *see also* Florida Statutes Anno. § 232.425(3)(c)(2) ("35th percentile"); Oregon Revised Statutes § 339.460(1)(b)(A) ("23rd percentile"); [Wyoming] WHSAA Rule 6.2.91 ("25th percentile").

in the face to parents who overwhelmingly choose to home school because they want to offer their child the best possible education. *See* Testimony of Edwina Pendarvis, Ph.D., Tr. at 56, R. at 569. Regardless, it would be a simple matter to address the Appellants' concern short of an absolute ban on all home schooled students' participation. Appellants could, as other states have done, adopt a rule that a failing student who withdraws from school will be ineligible until he or she successfully completes one full semester of home schooling[33] or some other proscribed period.[34]

C. SCHOOL SPIRIT, TEAM DISCIPLINE AND FINANCIAL CONSIDERATIONS DO NOT JUSTIFY DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS.

Appellants also seek to justify their regulations based upon notions of school spirit, team discipline and financial considerations. Upon inspection, none of those would appear to be affected in any way by permitting home schooled students to participate in interscholastic athletics.

Appellants' arguments regarding school spirit and discipline fly in the face of the current WVSSAC regulation which permits students from schools without a team to join a team at another middle school or junior high school in the same feeder school system. WVCSR § 127-2-3.2. Under that rule, there were children wrestling with Aaron Jones on the Mannington Middle School team who did not attend Mannington Middle School. Testimony of Rick Rinehart, Tr. at

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[33][Florida] FHSAA Handbook, Art. 11.1.4.

[34]Arizona Revised Statutes Anno. § 15-802.01(B) ("remainder of school year"); Idaho Code § 33-203(5) ("duration of the school year"); Oregon Revised Statutes § 339.460(1)(d) ("duration of school year and the following year").

169, R. at 682. Unlike Aaron, who has lived in Mannington his entire life, those children lived and attended schools in communities miles away from Mannington Middle School. Id. at 172, R. at 685. There also have been children from parochial schools in Marion County who have wrestled on the Mannington team. Testimony of Mike Hayes, Tr. at 184, R. at 697. Appellants have never contended that having children from other public and private schools participate on another school's team in any way adversely affects school spirit or the ability to maintain team discipline. Rather, they would distinguish those students from home schooled students because they may eventually end up at the same high school. State Board of Education Brief at 18. But there is no guarantee that will happen, anymore than there is no guarantee that Aaron Jones will not stop being home schooled someday and also attend North Marion High School.

The wrestling coach and activities director at Mannington Middle School both testified that having Aaron Jones on the team in no way affected team spirit, student support for the team or their ability to maintain discipline. Testimony of Rick Rinehart, Tr. at 161-163, R. at 674-676; Testimony of Mike Hayes, Tr. at 180-181, 185, R. at 693-694, 698. Mr. Hayes, who has been coaching athletic teams for over 24 years, also testified that he couldn't imagine a problem in disciplining any home schooled student, that he could sit the child down for a game or make the child run laps or kick the child off the team just as he would any other team member.[35] Testimony of Mike Hayes, Tr. at 175 & 185, R. at 688 & 698.

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[35]Other states that permit home schooled students to participate on athletic teams generally have adopted rules providing a home schooled student will be subject to the same rules of conduct as other team members, and such other standards as may apply, including residency, age, and transfers. E.g. Arizona Revised Statutes Anno. § 15-802.01(A); Colorado Revised Statutes Anno. § 22-32-116.5(2) & (4); Oregon Revised Statutes § 339.460(1); [Nevada] NIAA G.2070.0810(2); [Washington] WIAA Handbook § 18.5.4.

With respect to financial considerations, the Circuit Court found that Mannington Middle School incurred no additional costs by virtue of having Aaron on the team, that the bulk of costs associated with fielding a team, including coaches' salaries and facilities, are fixed at the time a school decides to field a team and the addition of home schooled students does not change that, and that any additional costs are satisfied through fundraising activities which home schooling families can participate in to the same extent as any other team member's family. Decision and Final Order at ¶¶ 36 & 37. *See also* Testimony of Mike Hayes, Tr. at 187-191, R. at 700-704; Testimony of Marianne Hughes, Tr. at 207-208, R. at 720-721; Testimony of Mike Hayden, Tr. at 336-337, 342, R. at 849-850, 855.

Appellants argue that they receive no state dollars for home schooled children and any directive allowing them to participate in interscholastic athletics represents an unfunded mandate. State Board of Education Brief at 16; WVSSAC Brief at 17. But the Circuit Court recognized that home schooling families, through their federal, state and local tax dollars, make the same contribution to public education in West Virginia as any other West Virginia taxpayer. Circuit Court Decision and Final Order, Conclusions of Law at ¶ 37. Since the overall education budget in West Virginia is a product of tax revenues, then home schooling families enable public schools to save the cost of educating their children and spend more proportionately on currently enrolled students. As such, it is hardly unreasonable to expect schools to absorb the *de minimis* costs, if any, that might arise from a home schooled student joining an athletic team.

As the Circuit Court recognized, if home schooled students can take individual public school classes and play in the school band without any apparent disruption in school spirit, discipline or school finances, then it simply makes no sense to single athletics out as the

exception to the rule. Circuit Court Decision and Final Order Conclusions of Law at ¶¶ 28, 40 & 48. It also is worth noting that home schooling students already participate in interscholastic athletics in other states with no reported problems. By way of contrast, Appellants could not offer one concrete example of problems stemming from a home schooled child's participation in a school related activity. Indeed, none of the principals who testified at trial could offer any personal experience with home schooled students, data, or studies that supported their alleged concerns. Testimony of William Watson, Tr. at 259 & 261, R. at 772 & 774; Testimony of Clinton Giles, Tr. at 288, R. at 801; Testimony of James Vickers, Tr. at 301, R. at 814. *See also* Testimony of Mike Hayden, Tr. at 356-358, R. at 869-871.

The Circuit Court concluded that Appellants' arguments regarding school spirit reflected an insular attitude as opposed to any legitimate concern. Circuit Court Decision and Final Order Conclusions of Law at ¶¶ 43 & 44. The Circuit Court also concluded that it was disingenuous for Defendants to rationalize the exclusion of home schooled students on the basis of money. Circuit Court Decision and Final Order Conclusions of Law at ¶ 35. There is nothing in the record that would refute those conclusions.

III. THE CIRCUIT COURT CORRECTLY FOUND APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS WITHOUT REGARD FOR THEIR ACADEMIC PERFORMANCE OR OTHER CONDUCT VIOLATED EQUAL PROTECTION PRINCIPLES.

Equal protection is an integral part of the West Virginia Constitution with its origins found at Article III, Section 10. *Phillip Leon M. v. Greenbrier County Bd. of Education*, 199 W. Va. 400, 404, 484 S.E.2d 909, 913 (1996); Syl. Pt. 4, *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989).

"Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." *Israel*, supra, 182 W. Va. at 458, 388 S.E.2d at 484 (citing *Reed v. Reed*, 404 U.S. 71, 75, 30 L. Ed.2d 225, 229, 92 S. Ct. 251, 253-54 (1971)). *See also, Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L. Ed. 2d 786, 798 (1981) (The Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike.")

The Circuit Court concluded that Appellants violated Aaron Jones' right to equal protection because their blanket prohibition on home schooled students participating in interscholastic athletics failed the applicable rational basis test. Circuit Court Decision and Final Order at 24. There is no reason for this Court to rule otherwise.

A. APPELLANTS' ELIGIBILITY RULES AND OTHER POLICIES CREATE A CLASSIFICATION THAT UNIQUELY DENIES HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS.

Appellants' eligibility standards mandate full-time school enrollment, passing work in four classes per semester, and maintenance of an overall 2.0 GPA. Appellants deny home schooled students any opportunity to participate in interscholastic athletics even though they are meeting all state requirements for full-time school attendance under the truancy laws, and they have the means to demonstrate they are doing passing work in their academic pursuits. Appellants' interpretation of their rules creates an eligibility classification which bars home schooled students from participating based solely upon their status as home schooled students without any regard for their individual academic performance or conduct. Home schooled students are the only group of students in West Virginia who have no opportunity whatsoever to

participate in interscholastic athletics.

With respect to Appellants' enrollment rules, students enrolled full-time in a private or public school can play on that school's teams. WVCSR § 126-26-3.2; WVCSR § 127-2-3.1.

Appellants have crafted various exceptions to the enrollment rule. Students at private or public schools at the middle school level that don't field a team in a particular sport may play on another school's team. WVCSR § 127-2-3.2. Students at the W. Va. School for the Blind and the W. Va. School for the Deaf can play on each other's teams or on the teams at Hampshire High School or Romney Middle School. WVCSR §§ 127-2-3.2.2 & 127-2-3.9.

With respect to Appellants' academic standards, any student in a public or private school can play sports so long as he or she passes 4 courses in the preceding semester, WVCSR § 127-2-6.1., and maintains an overall 2.0 GPA, WVCSR § 126-26-3.1. Failing students have an opportunity to bring their grades up and regain eligibility after only half a semester of ineligibility. WVCSR § 127-2-6.1.5; WVCSR § 126-26-3.1(h).

Again, Appellants have crafted various exceptions for students who otherwise might fail to meet the letter of their rules. Students in independent learning programs can play even though they fail to satisfy the minimum requirement for hours of instruction under the academic standards rules. WVCSR § 127-6-3. Students with individualized education plans can participate so long as they are making satisfactory progress in meeting the objectives of their IEP. WVCSR § 126-26-3.1(g).

Appellants policies also permit private and parochial students to participate, even though they almost certainly are subject to different curriculums than their public school counterparts.

Appellants have consistently refused to make any sort of accommodation for home

schooled students, even though, as the Circuit Court found, "the system has the inherent flexibility to deal fairly with exceptional circumstances." Circuit Court Decision and Final Order, Conclusions of Law at ¶ 61. The only option Appellants offer home schooled students is to stop home schooling and enroll full-time at a WVSSAC member school. *See* WVSSAC Letter to Daniel Jones, Plaintiffs' Ex. 4, R. at 250.[36]

Nor do home schooled students have the option of fielding a team of their own. Aside from the unlikelihood of securing facilities, uniforms or enough students to field a team, such a team would not be eligible to join the WVSSAC. Testimony of Mike Hayden, Tr. at 343-344, R. at 856-857. Moreover, it appears no member school of the WVSSAC would be permitted to play such a team of home schooled students. WVCSR § 127-3-12.1. Nor could a team of home schooled students participate in any WVSSAC tournaments. WVCSR § 127-3-17.1.

Since home schooled students cannot join the WVSSAC, they have no standing to petition the WVSSAC to amend its rules. WVCSR § 127-1-10.6. Nor as nonmembers can they appeal a non-eligibility determination. *See* WVSSAC Letter to Daniel Jones, Plaintiffs' Ex. 4, R. at 250.[37]

Absent a ruling by this Court, Appellants' policies effectively close the door on any chance that home schooled students might participate in interscholastic athletics and experience the educational and developmental opportunities such participation offers.

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[36]"However, if your son did enroll as a full time student at Mannington Middle School, he would be eligible to compete in wrestling."

[37] "The present policy of the Board of Directors prohibits them from hearing any eligibility request by a student not enrolled in a member school."

B. APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS CANNOT BE JUSTIFIED BASED UPON THE ARGUMENTS THAT HOME SCHOOLED STUDENTS HAVE OPTED OUT OF THE PUBLIC EDUCATION SYSTEM OR THAT THEY ARE NOT SIMILARLY SITUATED TO OTHER STUDENTS.

In addressing Appellees' equal protection claim, this Court must first determine whether home schooled students are similarly situated to the other students in West Virginia who have an opportunity to participate in interscholastic activities under Appellants' policies. Home schooled students are like any other student in West Virginia striving to achieve the best possible education they can, and for whom those involved in the educational endeavors of this State should seek to provide the richest possible menu of educational and developmental experiences. *See Gallery v. WVSSAC, supra*, 205 W. Va. at 367-68, 518 S.E.2d at 371-72.

Appellants contend that home schooled students and all other school aged children in West Virginia are not similarly situated because home schooling families have elected to opt out of the public school system. W. Va. Board of Education Brief at 13; WVSSAC Brief at 14-16. Appellants rely primarily upon this Court's holdings in *Janasiewicz v. The Board of Education of the County of Kanawha*, 171 W. Va. 423, 299 S.E.2d 34 (1982) and *State ex rel. Cooper v. The Board of Education of Summers County*, 197 W. Va. 668, 478 S.E.2d 341 (1996). In *Janasiewicz* and *Cooper* parents of parochial school children were trying to compel their county boards of education to provide bus transportation to their children's parochial schools.[38] The Court, in denying the parents' equal protection claim, found that parochial school children and

[38]It is worth noting the parents in *Janasiewicz* and *Cooper* were asking the schools to assume the costs of initiating a new bus line purely for parochial students. In the present case home schooled students are only asking to be allowed to participate in an activity Appellants already provide.

public school children were not similarly situated because the parochial school children had chosen to reject a free public education in favor of a privately paid education emphasizing religious beliefs and principles. Janasiewicz, supra, 171 W. Va. at 426, 299 S.E.2d at 37-38, Cooper, supra, 197 W. Va. at 672, 478 S.E.2d at 345.

With respect to the question of whether home schooled students have rejected a public education, the Circuit Court concluded:

> Contrary to the defendants' assertion, the home schooled child has not rejected public education. Rather, children such as Aaron are being educated in the manner chosen by their parents and approved by the State through the appropriate county board of education. Closing the doors to their participation in sports further perpetuates the social isolation that is an obvious detriment to home schooling.

Circuit Court's Decision and Final Order, Conclusions of Law at ¶ 43.

In relying upon *Janasiewicz* and *Cooper* Appellants ignore the fact that home schooled students are still part the public education system. As this Court held in *State v. Riddle*, 168 W. Va. 429, 285 S.E.2d 359 (1981), they don't have the option of opting out. Rather, home schooling parents must report to the county board of education and superintendent regarding their plan of instruction and their children's academic progress. W. Va. Code § 18-8-1(c)(1) & (2)(C). The county superintendent is authorized to initiate proceedings to halt a parent's ability to home school their child based upon a finding of educational neglect. W. Va. Code § 18-8-1(c)(2). County boards of education permit home schooled children to take classes at their local schools pursuant to W. Va. Code § 18-8-1(c)(3), and for many years home schooled students have taken advantage of that opportunity. *See* Testimony of Marianne Hughes, Tr. at 203, R. at 716; Testimony of Edwina Pendarvis, Ph.D., Tr. at 60, R. at 573. Home schooled children have the

right to use the same text books[39] and take the annual standardized academic achievement test side by side with enrolled students.[40]

None of the above applied to the parochial school students seeking relief in *Janasiewicz* and *Cooper*. It also is worth noting that parochial and other private school students are afforded an opportunity to participate in interscholastic athletics. As such, the classification at issue in the present case does not distinguish between "public" and "nonpublic" students. What it does is distinguish between home schooled children and every other student in West Virginia who is afforded a reasonable opportunity to participate in interscholastic athletics, including nonpublic private and parochial school students.

With respect to the various rationales for Appellants eligibility standards--promotion of academic standards, school spirit, discipline and school finances--the Circuit Court found there were no significant distinctions between the home schooled student wanting to join a sports team and home schooled students already taking classes at a public school or participating in the school's band or other activities. Circuit Court's Decision and Final Order, Findings of Fact at ¶¶ 34, 44; Conclusions of Law at ¶¶ 22, 28, 48. Nor is there any apparent difference between home schooled students and private or public school students at schools without teams who Appellants permit to join teams at other middle schools pursuant to WVCSR § 127-2-3.2. With respect to academic standards, the evidence below was that home schooled students could be evaluated in a comparable fashion to enrolled students through the use of a portfolio review. Testimony of Edwina Pendarvis, Ph. D., Tr. at 57, R. at 570.

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[39]W. Va. Code § 18-8-1(c)(3).

[40]W. Va. Code § 18-8-1(c)(2)(C)(ii).

If home schooled students are similarly situated to other students who are permitted an opportunity to participate in interscholastic athletics, then the only issue that remains is whether Appellants can justify the disparate treatment of home schooled students their policies and interpretations effect.

C. THERE IS NO RATIONAL BASIS FOR APPELLANTS' POLICIES DENYING HOME SCHOOLED STUDENTS ANY OPPORTUNITY TO PARTICIPATE IN INTERSCHOLASTIC ATHLETICS.

In considering a rational basis analysis in the present case, it bears repeating that Appellees are not contending there is an absolute right to participate in interscholastic athletics or that Appellants cannot promulgate reasonable standards for participation. That has been decided in *Bailey v. Truby*.[41] The issue in the present case with respect to the rational basis analysis is whether Appellants can establish a rational basis for the disparate treatment of home schooled children their policies and interpretations effect.

In applying the rational basis test, this Court has adopted a three prong analysis:

The first prong of equal protection analysis of economic rights[42] is whether the

[41]The holding in *Bailey* that participation in athletics is not a fundamental right simply permits Appellants to condition participation upon reasonable rules and regulations. 174 W. Va. at 23, 321 S.E.2d at 318. It does not give Appellants carte blanche to do whatever they want. *See generally State ex re. Lambert v. West Virginia State Board of Education*, 191 W. Va. 700, 709, 447 S.E.2d 901, 910 (1994); *Hamilton v. Secondary Schools Activities Commission,*182 W. Va. 158, 386 S.E.2d 656 (1989); *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W. Va. 454, 388 S.E.2d 480 (1989). It is one thing to say school officials can establish reasonable academic standards or rules of conduct. It is quite another to say they can apply those rules in such a way as exclude an entire group of students without any regard for their individual academic performance or conduct. The latter cries out for some sort of meaningful judicial review.

[42]The opportunity to participate in interscholastic athletics represents an undisputed educational benefit for students. As such, the interest at issue in this case is something more than a mere economic right. The United States Supreme Court has found:

classification is rationally based on social, economic, historic or geographic factors .... Next we must determine whether the second equal protection factor has been satisfied, i.e., whether the classification bears a reasonable relationship to a proper governmental purpose .... Lastly we must decide whether [the statute] treats all persons equally who are within the subject classification.

Carvey v. West Virginia State Board of Education, 206 W. Va. 720, 729-30, 527 S.E.2d 831, 840-41 (1999). *See also State ex rel. Boan v. Richardson*, 198 W. Va. 545, 547, 482 S.E.2d 162, 164 (1996); *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 734, 474 S.E.2d 906, 915 (1996); *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 228, 438 S.E.2d 15, 20 (1993).

In *Whitlow*, the Court, while recognizing the standard of review under the rational basis test is quite deferential, also recognized:

> The Equal Protection Clause of [the Fourteenth Amendment to the United States Constitution] does ... deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

190 W. Va. at 228, 438 S.E.2d 20 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 990, 40 S. Ct. 560, 561 (1920). The Court in *Whitlow* went on to recognize:

> A legislative act which arbitrarily establishes diverse treatment for the members of a natural class results in invidious discrimination and where such treatment or classification bears no reasonable relationship to the purpose of the act, such act violates the equal

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Public education is not a right granted to individuals by the Constitution. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Plyler v. Doe, supra, 457 U.S. at 221, 102 S. Ct. at 2396-97, 72 L. Ed. 2d at 801.

protection and due process clauses of our federal and state constitutions.

190 W. Va. at 230, 438 S.E.2d 22 (quoting Syl. Pt. 1, *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977)). *See also, Lepon v. Tiano*, 181 W. Va. 185, 381 S.E.2d 384 (1989).

In their treatise on Constitutional Law, Nowak and Rotunda recognize:

> [I]f a state singles out a class of children and denies them all educational opportunity, that classification should be subject to some form of independent judicial review. The basis upon which the class is defined need not be suspect because the singling out of an identified class of children for complete denial of this important governmental benefit would seem to be arbitrary on its face.

Nowak & Rotunda, Treatise on Constitutional Law, § 14.45 at 1093 (7th ed. 2004).

The fundamental purpose behind the policies at issue in the present case is to promote academic excellence. But as Appellees have demonstrated already, affording home schooled students a reasonable opportunity to participate in interscholastic athletics in no way limits Appellants' ability to establish academic standards for enrolled students. On the other hand, Appellants' policies do deny home schooled students access to a valuable educational and developmental opportunity that interscholastic athletics represents. In that regard, Appellants policies are in conflict with the fundamental goal of ensuring that every child in West Virginia have access to richest possible menu of educational and developmental opportunities. Moreover, to the extent participation in interscholastic athletics represents a legitimate tool for encouraging academic performance, withholding that tool from home schooling parents makes no sense. Finally, it must be noted that while the promotion of academic excellence is the goal underpinning Appellants' eligibility rules, those rules are applied to home schooling students without any regard for their actual academic performance. Circuit Court's Decision and Final Order, Conclusions of Law at ¶ 21.

Nor can Appellants' total exclusion of home schooled students be justified upon considerations related to school spirit, discipline or finances. After hearing the evidence, the Circuit Court concluded that permitting home schooled students to participate in interscholastic athletics would in no way adversely affect school spirit, limit officials' ability to maintain discipline, or significantly impact school budgets. Circuit Court's Decision and Final Order, Conclusions of Law at ¶¶ 27, 36, 46. The evidence below supports that conclusion and there is no reason for this Court to find otherwise.

Appellants fail the rational basis test when they deny home schooled students any opportunity to participate in interscholastic athletics without regard for individual academic performance or conduct, but extend that opportunity to all other students in West Virginia, including parochial and private school students. Appellants fail the rational basis test when they carve out exceptions to their enrollment and academic standards rules for students at middle schools without teams, students in independent learning programs, and students with individualized education plans, but they refuse to make any accommodation for home schooled students. Appellants fail the rational basis test when they permit home schooled children access to courses, band and other aspects of a public education, but arbitrarily withhold access to interscholastic athletics.

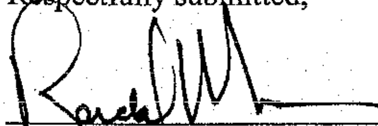
CONCLUSION

All Aaron Jones and other home schooled children in West Virginia seek in the present case is the opportunity to play a game. And there is no question home schooled students' education would be enhanced by that opportunity. Nor, for that matter, is there any serious dispute that Appellants easily could accommodate home schooled students as other states are

doing. Appellants' strained justifications for barring home schooled students from playing cannot withstand even a minimal degree of real scrutiny.

Nothing we do as a society or a government is more important than the education of our children. No child should be denied an educational opportunity without some legitimate purpose. No such purpose exists in the present case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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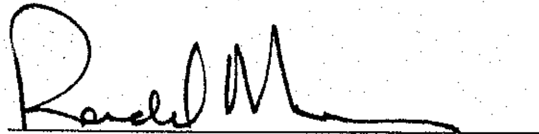

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